TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 709

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE PRESIDENT, OPERATING PHILADELPHIA & READING RAILWAY, PLAINTIFF IN ERROR,

vs.

GEORGE B. NEWTON COAL CO'IPANY

No. 710

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AGENT, OPERATING THE PENNSYLVANIA RAILROAD, PLAINTIFF IN ERROR,

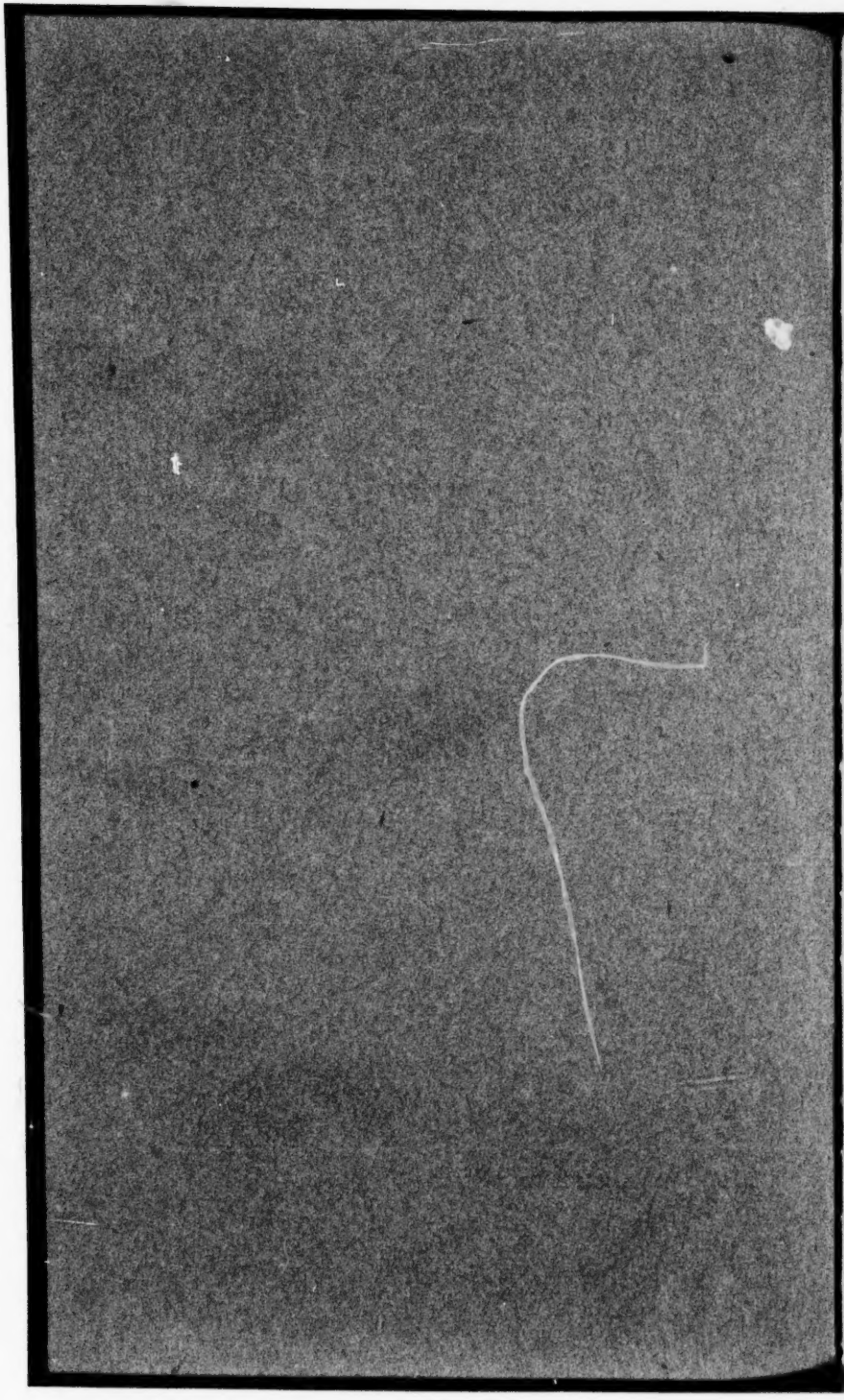
vs.

GEORGE B. NEWTON COAL COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED OCTOBER 6, 1921

(29,674, 29,675)



(30,674, 30,675)

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RECORD.

I. RELEVANT DOCKET ENTRIES.

GEORGE B. NEWTON COAL CO.

vs.

JAMES C. DAVIS, Director General of Railroads, operating the Phila. and Reading Railway.

A. S. Olmsted, 2nd
1367.
W. C. Mason,
(see writ)

Sums Trespass exit June 7, 1921, Ret. 2 Mon. June 1921.

June 8, 1921 Statement and notice to file an Afft. of Defense filed.

June 9, 1921, Service accepted.

June 22, 1921, Afft. of Defense filed.

Nov. 6, 1922, Agreement to try case before a Judge without a Jury filed.

April 4, 1923, Stenographic notes filed.

June 21, 1923 Findings and conclusions of the Trial Judge filed.

Eo die, Plaintiff's request for findings of fact and conclusions of law and answers thereto filed.

Eo die, Defendant's request for findings of fact and conclusions of law and answers thereto filed.

July 3, 1923, Defendant's exceptions to findings of the Trial Judge filed.

Dec. 12, 1923, Exceptions dismissed.

Eo die, Reasons for dismissing exceptions filed.

Dec. 18, 1923, Judgment on findings in favor of plaintiff.

Eo die, Damages assessed at $3,386.49.

Dec. 19, 1923 Withdrawal of plff's exceptions filed.

March 8, 1924 Certiorari from Supreme Court as of Jan. Term, 1925, No. 33 brought into office.

II. RELEVANT DOCKET ENTRIES.

GEORGE B. NEWTON COAL CO.

vs.

JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad.

A. S. Olmsted, 2nd,
1369

J. H. Barnes,
8/8/21.

Sums Trespass exit June 7, 1921, Ret. 2 Mon. June 1921.

June 8, 1921 Statement and notice to file an Afft. of Defense filed.

June 13, 1921, Served.

June 14, 1921, Afft. of Service of Statement on June 13, 1921 with notice to file an Afft. of Defense.

Aug. 19, 1921, Afft. of Defense filed.

June 21, 1923, Findings and conclusions of the Trial Judge filed.

July 3, 1923, Deft's exceptions to findings of the Trial Judge filed.

Dec. 12, 1923, Deft's exceptions dismissed.

Eo die, Reasons for dismissing the exceptions filed.

Dec. 18, 1923, Judgment on findings in favor of plaintiff.

Eo die, Damages assessed at $8,109.95.

Dec. 19, 1923, Withdrawal of Plff's exceptions filed.

March 8, 1924, Certiorari from Supreme Court as of Jan. Term, 1925, No. 34, brought into office.

III. PLAINTIFF'S STATEMENT OF CLAIM.

GEORGE B. NEWTON COMPANY
vs.
JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating Philadelphia & Reading Railway.

C. P. No. 4.
June Term, 1921.
No. 1367.

The plaintiff, GEORGE B. NEWTON COAL COMPANY, pursuant to Section 206 of the Transportation Act—1920, brings this suit against the defendant, James C. Davis, Director General of Railroads, as Agent of the President, operating the Philadelphia and Reading Railway, to recover the sum of $2,757.73 with interest thereon from March 1, 1920, upon a cause of action, whereof the following is a statement:

1. The plaintiff is a corporation, incorporated under the laws of Pennsylvania and engaged inter alia in the business of buying and selling bituminous coal in the city of Philadelphia.

2. The defendant, James C. Davis, Director General of Railroads, as Agent is an officer of the United States, designated by the President pursuant to the provisions of section 206 of the Transportation Act, 1920, for the purpose of bringing against said agent actions arising out of the possession, use or operation by the President of the Philadelphia & Reading Railway during the period of Federal control. During the period of Federal control, viz., from December 27, 1917, to February 29, 1920, inclusive, the President operated the said Philadelphia & Reading Railway, under the provisions of the Federal Control Act and of the Act of August 29, 1916.

3. During the months of January and February, 1920, plaintiff purchased and caused to have shipped to it, 33 cars of bituminous coal, aggregating 1889.65 net tons, over the line of the Philadelphia & Reading Railway. The date of shipment, car initial and number, the shipper, the destination, the weight, the cost of the coal at the mines, the freight rate, and the delivered cost of each car so shipped are stated in Appendix 1, which is attached hereto and made a part hereof.

4. All of the said coal was purchased by the plaintiff f. o. b. mines and became the property of the plaintiff immediately upon shipment.

5. The defendant confiscated the coal, taking and converting it to his own use, and has never delivered it to the plaintiff or to anyone in its behalf.

6. The cost of the coal to the plaintiff, f. o. b. cars Philadelphia, as shown in detail in Appendix 1, was $9,411.62, or approximately $4.98 a net ton of 2000 pounds.

7. The market value of the coal at the time and place it should have been delivered, viz. in January, February and March at Philadelphia, was $6.44 a net ton or $12,169.35.

8. In order to protect its contracts with its customers, the plaintiff had to buy coal on the open market to replace the coal thus confiscated by the defendant. It bought an equal tonnage of coal, of a quality as similar to the coal confiscated as was obtainable, at the best price obtainable. The quality of coal thus purchased was, however, inferior to that of the coal confiscated. The cost of the coal thus purchased was $12,169.35 or approximately $6.44 per net ton.

9. The defendant has never paid the plaintiff for any of the coal it so confiscated, but in the plaintiff's behalf, the defendant has paid the shippers of the coal (from whom the plaintiff had purchased it) the contract price which the plaintiff was obligated to pay them, viz. an aggregate of $9,411.62 (including freight charges and war tax).

Wherefore, the defendant owes the plaintiff $2,757.73 (together with interest thereon from March 1, 1920), being the difference between the value of the plaintiff's coal confiscated by the defendant and the amount which the defendant, in plaintiff's behalf, has paid to plaintiff's creditors.

ALLEN S. OLMSTED, 2ND,
WILLIAM A. GLASGOW, JR.,
Attorneys for Plaintiff.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss:*

RAYMOND Y. WARNER, being duly sworn according to law, deposes and says that he is Vice President and Treasurer of the GEORGE B. NEWTON COAL COMPANY, plaintiff above named; and he is authorized to make this affidavit on behalf of said plaintiff; and that the facts set forth in the foregoing statement of claim are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 8th day of June, 1921.

RAYMOND Y. WARNER.

LAURA M. STURTEVANT,
Notary Public.
My Commission expires Feb. 21st, 1923.

BITUMINOUS COAL CONFISCATED ON PHILA. & READING RAILROAD SHIPPED FROM JANUARY 1ST TO FEB. 29TH, 1920 INC.

Date Shipped	Car Number	Shipper	Destination	(Pounds) Weight	Cost of Coal Net Ton	Freight Gross Ton Plus 3% Tax	Total Del'd Cost
1/26	BW 3530	Berwind White Coal Mining Co.	Ninth Street	110,700	$2.95	$2.20	$275.25
1/26	BW 3361	"	"	111,600	2.95	2.20	277.51
1/26	BW 2673	"	"	115,200	2.95	2.20	286.45
1/26	BW 1760	"	"	112,400	2.95	2.20	279.49
1/27	BW 2092	"	"	113,000	2.95	2.20	280.98
1/27	BW 4627	"	"	110,800	2.95	2.20	275.51
1/22	BW 4966	"	"	116,500	2.95	2.20	289.68
1/22	BW 2451	"	"	112,800	2.95	2.20	280.49
1/23	BW 2863	"	"	117,800	2.95	2.20	292.92
1/26	PRR 217520	Madeira, Hill & Co.	"	96,100	2.40	2.45	223.58
1/15	BW 4559	Berwind White Coal Mining Co.	4th & Allegheny	115,500	2.95	2.20	287.20
1/22	BW 3688	"	"	115,700	2.95	2.20	287.70
1/22	BW 4409	"	"	117,500	2.95	2.20	292.16
2/6	BW 2915	"	"	105,800	2.95	2.20	263.09
2/16	BW 4433	"	"	112,900	2.95	2.20	280.74
2/20	BW 4215	"	"	115,000	2.95	2.20	285.96
2/25	BW 2323	"	"	113,300	2.95	2.20	281.74
2/6	BW 4604	"	Ninth Street	102,400	2.95	2.20	254.62
2/10	BW 2039	"	"	112,200	2.95	2.20	279.01
2/16	BW 4933	"	"	112,500	2.95	2.20	279.74
2/20	BW 3991	"	"	114,400	2.95	2.20	284.47
2/20	BW 4085	"	"	115,200	2.95	2.20	286.45
2/21	BW 3666	"	"	113,100	2.95	2.20	281.23
2/21	BW 2127	"	"	115,400	2.95	2.20	286.96
2/26	BW 1518	"	"	113,100	2.95	2.20	281.23
2/14	CEI 88644	Consolidation Coal Co.	23rd & Arch Sts.	109,600	3.7828	2.20	318.16
2/14	PRR 196278	Penna. Coal & Coke Co.	Ninth Street	155,000	2.95	2.20	385.43
2/16	PRR 186595	"	"	150,900	2.95	2.20	375.24
2/25	MC 10545	Madeira, Hill & Co.	"	101,200	2.40	2.45	235.45
2/2	BW 4972	Berwind White Coal Mining Co.	"	113,900	2.95	2.20	283.22
2/2	BW 3540	"	"	116,400	2.95	2.20	289.44
2/5	BW 2330	"	"	113,100	2.95	2.20	281.22
2/6	BW 3492	"	"	108,300	2.95	2.20	269.30
				3,779,300 lbs.			$9,411.62

IV. AFFIDAVIT OF DEFENCE OF JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE PRESIDENT, OPERATING PHILADELPHIA & READING RAILWAY.

Answering the averments contained in the plaintiff's statement of claim, the defendant James C. Davis admits that as Federal Agent appointed under the Transportation Act he is properly named as defendant in the above entitled cause.

The defendant denies, however, that the plaintiff is entitled to recover from him the sum of $2757.73, nor any other sum whatsoever under the facts stated in the plaintiff's declaration.

The defendant avers that under the provisions of the Acts of Congress, the rules and regulations promulgated by the President of the United States, the Director General of Railroads of the United States Railroad Administration, and the Federal Fuel Administrator of the United States Fuel Administration, all of which the defendant refers to more particularly as the same are recorded in the proper departments of the Government of the United States, the payment made by the defendant, or his predecessors in office, set forth and referred to in paragraph nine of the plaintiff's declaration, was a full and complete discharge of any and all obligations owing by the defendant and his predecessors in office to the shippers of the coal referred to in the plaintiff's declaration, whether the shippers by the plaintiff or others, and a full and complete discharge of any and all obligations owing by the defendant or his predecessors in office to the consignees of the coal referred to in the plaintiff's declaration, whether the consignees were the plaintiff or others.

The defendant demands proof of each and every averment of the plaintiff's declaration if the same shall be held material, and claims the benefit of all of the Acts of Congress and the regulations aforesaid to which this defendant may be entitled as a full and complete defence at the trial of this cause.

The defendant therefore denies any liability whatsoever to the plaintiff, and prays that at the trial of this cause the plaintiff's claim shall be dismissed.

JAMES C. DAVIS, Director General
of Railroads, as Agent, &c.,
By WM. CLARKE MASON,
Counsel.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss:*

CHARLES H. EWING, being duly sworn according to law, deposes and says: that he was the Federal Manager for the defendant within named or his predecessors in office, and that the facts set forth in the foregoing affidavit of defence are true to the best of his knowledge, information and belief.

Sworn to and subscribed
before me this 15th day of
June A. D. 1921.

CHARLES H. EWING.

H. KELLERMAN, JR.,
(Seal) *Notary Public.*
Com. Exp. 3/7/25.

V. PLAINTIFF'S STATEMENT OF CLAIM.

GEORGE B. NEWTON COMPANY
vs.
JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad.

C. P. No. 4.
June Term, 1921.
No. 1369.

The plaintiff, GEORGE B. NEWTON COAL COMPANY, pursuant to Section 206 of the Transportation Act, 1920, brings this suit against the defendant, James C. Davis, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad, to recover the sum of $6,604.20 with interest thereon from March 1, 1920, upon a cause of action, whereof the following is a statement:

1. The plaintiff is a corporation, incorporated under the laws of Pennsylvania and engaged inter alia in the business of buying and selling bituminous coal in the city of Philadelphia.

2. The defendant, James C. Davis, Director General of Railroads, as Agent, is an officer of the United States, designated by the President pursuant to the provisions of Section 206 of the Transportation Act, 1920, for the purpose of bringing against said agent actions arising out of the possession, use or operation by the President of the Pennsylvania Railroad, during the period of Federal control. During the period of Federal Control, viz., from December 27, 1917, to February 29, 1920, inclusive, the President operated the said Pennsylvania Railroad, under the provisions of the Federal Control Act and of the Act of August 29, 1916.

3. During the months of January and February, 1920, the plaintiff purchased and caused to have shipped to it, 80 cars of bituminous coal, aggregating 4577.55 net tons, over the line of the Pennsylvania Railroad. The date of shipment, the car initial and number, the shipper, the destination, the weight, the cost of the coal at the mines, the freight rate and the total delivered cost of each car so shipped are stated in Appendix 1, which is attached hereto and made a part hereof.

4. All of the said coal was purchased by the plaintiff f. o. b. mines and became the property of the plaintiff immediately upon shipment.

5. The defendant confiscated the coal, taking and converting it to his own use, and has never delivered it to the plaintiff, or to anyone in its behalf.

6. The cost of the coal to the plaintiff, f. o. b. cars Philadelphia, as shown in detail in Appendix 1, was $22,875.22 or approximately $5.00 a net ton of 2000 pounds.

7. The market value of the coal at the time and place it should have been delivered, viz., in January, February and March at Philadelphia, was $6.44 a net ton or $29,479.42 in all.

8. In order to protect its contracts with its customers, the plaintiff had to buy coal on the open market to replace the coal thus confiscated by the defendant. It bought an equal tonnage of coal, of a quality as similar to the coal confiscated as was obtainable, at the best price obtainable. The quality of coal thus purchased was, however, inferior to that of the coal confiscated. The cost of the coal thus purchased was $29,479.42 or approximately $6.44 per net ton.

9. The defendant has never paid the plaintiff for any of the coal he so confiscated, but in the plaintiff's behalf, the defendant has paid the shippers of the coal (from whom the plaintiff had purchased it) the contract price which the plaintiff was obligated to pay them, viz., an aggregate of $22,875.22 (including freight charges and War Tax).

Wherefore, the defendant owes the plaintiff $6,604.20 (together with interest thereon from March 1, 1920), being the difference between the value of the plaintiff's coal confiscated by the defendant and the amount which the defendant, in plaintiff's behalf, has paid to plaintiff's creditors.

ALLEN S. OLMSTED, 2ND,
WILLIAM A. GLASGOW, JR.,

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

RAYMOND Y. WARNER, being duly sworn according to law, deposes and says that he is Vice President and Treasurer of the George B. Newton Coal Company, plaintiff above named; and he is authorized to make this affidavit on behalf of said plaintiff; and that the facts set forth in the foregoing statement of claim are true to the best of his knowledge, information and belief.

Sworn to and subscribed
before me this 8th day of
June, 1921.

RAYMOND Y. WARNER.

LAURA C. STURTEVANT,
Notary Public.
My commission expires Feb. 21, 1923.

BITUMINOUS COAL CONFISCATED ON PENNA. RAILROAD SHIPPED FROM JANUARY 1st TO FEB. 29th, 1920, INC.

Date Shipped	Car Number	Shipper	Destination	(Pounds) Weight	Cost of Coal Net Ton	Freight Gross Ton	Total Del'd Cost
1/21	BW 3745	Berwind White Coal Mining Co.	Frankford	118,200	$2.95	$2.20	$293.92
1/21	BW 2811	"	"	117,100	2.95	2.20	291.18
1/22	BW 2687	"	"	118,200	2.95	2.20	293.92
1/22	BW 4516	"	"	121,400	2.95	2.20	301.88
1/22	BW 4605	"	"	121,200	2.95	2.20	301.37
1/22	BW 2804	"	"	114,800	2.95	2.20	285.46
1/23	BW 2685	"	"	116,100	2.95	2.20	288.70
2/3	BW 2791	"	30th & Chestnut	118,200	2.95	2.20	293.92
2/3	BW 1611	"	"	115,600	2.95	2.20	287.46
2/3	BW 3427	"	Ninth Street	116,600	2.95	2.20	289.94
2/3	BW 1622	"	"	116,100	2.95	2.20	278.75
2/3	BW 3867	"	"	116,300	2.95	2.20	289.19
2/3	BW 3739	"	Ontario Street	118,000	2.95	2.20	293.42
2/3	BW 2675	"	"	116,100	2.95	2.20	288.70
2/3	BW 4048	"	"	116,500	2.95	2.20	289.69
2/28	BW 4018	"	"	111,600	2.95	2.20	277.51
2/28	BW 2901	"	"	113,400	2.95	2.20	281.99
2/28	BW 2427	"	"	113,400	2.95	2.20	281.99
2/28	BW 3671	"	"	109,500	2.95	2.20	272.28
2/28	BW 3615	"	"	112,400	2.95	2.20	279.48
2/3	BW 4085	"	4th & Allegheny	114,900	2.95	2.20	285.72
2/3	BW 4412	"	"	117,500	2.95	2.20	292.17
2/3	BW 2543	"	Frankford	116,200	2.95	2.20	288.95
2/3	BW 3912	"	Frankford	116,500	2.95	2.20	289.68
2/3	BW 2204	"	"	114,800	2.95	2.20	285.46
2/4	BW 3628	"	"	115,000	2.95	2.20	285.97
2/5	BW 4406	"	"	111,800	2.95	2.20	278.00
1/20	PRR 190803	W. C. Huber & Company.	30th & Chestnut	157,800	3.20	2.20	412.10
2/2	P&R 30737	"	"	70,000	3.20	2.20	182.81
1/30	C&O 56856	Commercial Coal Mining Co.	"	107,800	3.00	2.20	270.75
1/16	LV 18821	"	Ontario Street	105,800	3.00	2.20	265.73
1/30	PRR 250443	"	"	103,200	3.00	2.20	259.20
2/3	B&O 126287	"	30th & Chestnut	110,800	3.00	2.20	278.28
2/28	PRR 190329	"	Ontario Street	152,300	3.00	2.20	382 52
2/28	PRR 171300	"	"	149,500	3 00	2.20	375.48
2/2	PRR 188089	Penna. Coal & Coke Co.	Ninth Street	153,200	2.95	2.20	380.94
2/2	LV 46913	Whitney & Kemmerer	Ontario Street	71,200	2.97	2.45	185.94
1/12	CNJ 65439	Madeira, Hill & Co.	"	117,300	3.21	2.20	306.94
1/13	D&H 28717	"	"	91,300	3.21	2.20	238.90
1/24	WM 8562	"	Frankford	100,000	3.21	2.20	261.66
2/3	NH 120624	"	"	110,000	3.21	2.20	287.83
				9,155,100 lbs			$22,875.22

BITUMINOUS COAL CONFISCATED ON PENNA. RAILROAD SHIPPED FROM JANUARY 1ST TO FEB. 29TH, 1920, INC.

Date Shipped	Car Number	Shipper	Destination	(Pounds) Weight	Cost of Coal Net Ton	Freight Gross Ton Plus 3% Tax	Total Del'd Cost
1/20	BW 2841	Berwind White Coal Mining Co.	30th & Chestnut	113,000	$2.95	$2.20	$280.98
1/20	BW 4679	"	"	113,300	2.95	2.20	281.74
1/20	BW 3988	"	"	113,300	2.95	2.20	281.74
1/20	BW 2487	"	"	111,900	2.95	2.20	278.25
1/20	BW 2039	"	"	112,800	2.95	2.20	280.48
1/20	BW 3523	"	"	109,600	2.95	2.20	272.53
1/26	BW 2757	"	"	114,900	2.95	2.20	285.71
1/28	BW 2262	"	"	115,200	2.95	2.20	286.45
1/26	BW 1786	"	11th & Willow	113,200	2.95	2.20	281.49
1/12	BW 4761	"	Ninth Street	114,300	2.95	2.20	284.22
1/15	BW 2258	"	"	113,700	2.95	2.20	282.72
1/16	BW 4242	"	"	114,900	2.95	2.20	285.72
1/16	BW 3757	"	"	113,300	2.95	2.20	281.74
1/20	BW 4626	"	"	112,700	2.95	2.20	280.24
1/20	BW 4241	"	"	112,800	2.95	2.20	280.48
1/20	BW 2506	"	North Phila.	114,800	2.95	2.20	285.46
1/14	BW 4860	"	Ontario Street	115,000	2.95	2.20	285.96
1/14	BW 3669	"	"	113,000	2.95	2.20	280.99
1/14	BW 2053	"	"	114,900	2.95	2.20	285.72
1/14	BW 4405	"	"	115,400	2.95	2.20	286.95
1/20	BW 2744	"	"	115,300	2.95	2.20	286.71
1/20	BW 2577	"	"	113,900	2.95	2.20	283.22
1/20	BW 3788	"	"	112,100	2.95	2.20	278.75
1/20	BW 3563	"	"	108,200	2.95	2.20	269.06
1/21	BW 4184	"	"	115,600	2.95	2.20	287.46
1/21	BW 3726	"	"	114,100	2.95	2.20	283.72
1/21	BW 2522	"	"	115,500	2.95	2.20	287.20
1/22	BW 3532	"	"	113,200	2.95	2.20	281.48
1/22	BW 2630	"	"	117,400	2.95	2.20	291.93
1/22	BW 3884	"	"	110,500	2.95	2.20	274.77
1/22	BW 2316	"	"	115,600	2.95	2.20	287.46
1/20	BW 4879	"	4th & Allegheny	113,600	2.95	2.20	282.48
1/20	BW 1654	"	Harrowgate	107,400	2.95	2.20	267.06
1/17	BW 4298	"	Frankford	113,400	2.95	2.20	281.99
1/17	BW 4731	"	"	115,600	2.95	2.20	287.46
1/19	BW 4116	"	"	114,300	2.95	2.20	284.22
1/19	BW 2486	"	"	113,200	2.95	2.20	281.49
1/20	BW 3565	"	"	115,400	2.95	2.20	286.96
1/20	BW 4100	"	"	115,200	2.95	2.20	286.45
		Carried forward		4,431,500 lbs.			$11,019.44

VI. AFFIDAVIT OF DEFENSE OF JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT OF THE PRESIDENT, OPERATING THE PENNSYLVANIA RAILROAD.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss:*

I, JOHN M. HENRY, General Superintendent Motive Power, Eastern Region, Pennsylvania System, being duly sworn according to law, deposes and says that at the time of the occurrences mentioned in plaintiff's statement of claim he was Assistant General Superintendent, Motive Power, of Director General of Railroads operating Pennsylvania, Eastern Lines; that as such he was familiar with said occurrences and on behalf of James C. Davis, Director General of Railroads, Agent, the defendant above named, deposes and says that said defendant has a just, full and true defence to the whole of plaintiff's claim of the following nature and character, all of which defendant expects to prove at the trial of the above case.

1 and 2. Admitted.

3. Admitted that the cars described in paragraph 3 of plaintiff's statement of claim were shipped over the line of the Pennsylvania Railroad on the dates therein mentioned, and that said cars contained 4,577.55 net tons of coal, but as defendant has no knowledge or means of knowledge as to whether plaintiff had purchased and caused to have shipped to it said cars of coal and as to the cost at the mines and the total delivered cost of said coal, affiant cannot admit the truth of said averments and therefore denies the same. Affiant also denies the truth of the statement "bitumin-

ous coal confiscated on Pennsylvania Railroad'' at the top of Appendix 1 attached to plaintiff's statement of claim.

4. As defendant has no knowledge or means of knowledge of the averments contained in the fourth paragraph of plaintiff's statement of claim, affiant cannot admit the truth thereof and therefore denies the same.

5. Affiant denies that defendant confiscated the coal and took and converted it to his own use. Affiant admits that the coal was diverted and never delivered to the plaintiff or anyone in its behalf, which affiant avers defendant had the right to do under the Act of Congress approved August 10, 1917, 40 Stat. at Large, 276, and the Proclamations and Regulations of the President of the United States and of the United States Fuel Administrator issued thereunder.

6. As defendant has no knowledge or means of knowledge of the averments contained in the Sixth paragraph of plaintiff's statement of claim, affiant cannot admit the truth thereof and therefore denies the same.

7. Denied. Affiant denies that the market price of said coal was as set forth by plaintiff and avers that the only lawful price for said coal was the price fixed by the President of the United States and the United States Fuel Administrator pursuant to the provisions and authority of said Act of Congress approved August 10, 1917; said price being $2.95 per ton of 2000 pounds f. o. b mines.

8. Denied. Affiant avers that the shipments de-

scribed by plaintiff were made and could only lawfully be made subject to diversion pursuant to the regulations of the President of the United States and the United States Fuel Administrator issued by authority of said Act of Congress and that under said regulations the liability of plaintiff to pay for said coal ceased when it was diverted by the defendant. Affiant further denies that under the law and the regulations above referred to, plaintiff was obligated to buy coal in the open market to replace the coal diverted by the defendant in order to protect plaintiff's contracts with its customers; said coal having been diverted through no fault of plaintiff and the plaintiff having thus been prevented from carrying out its contracts with its customers. Defendant has no knowledge or means of knowledge as to the quantity, quality and price of the coal alleged to have been purchased by plaintiff, and affiant therefore cannot admit the truth of plaintiff's averments in this regard, and therefore denies the same.

9. Admitted, except that affiant denies that defendant owes plaintiff $6,604.20 with interest from March 1, 1920, or any part thereof.

Sworn to and subscribed
to before me this 17th day of August, 1921.

JOHN M. HENRY.

HENRY E. CAIN,
(Seal) *Notary Public.*
Commission Expires Feb'y 21, 1923.

VII. AGREEMENT TO TRY BEFORE A JUDGE WITHOUT A JURY.

GEORGE B. NEWTON COAL COMPANY
vs.
JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Philadelphia and Reading Railway.

C. P. No. 4.
June Term, 1921.
No. 1367.

AND NOW, November , 1922, it is agreed by and between the parties to the above action, that trial by jury be dispensed with, and that the above case be tried before a judge of this court, under the Act of Assembly in such case made and provided, the trial Judge to enter such judgment as shall be necessary and requisite to enforce his decision under this agreement, subject to appeal, at the option of either party.

ALLEN S. OLMSTED, 2ND,
Plaintiff's Attorney.

WM. CLARKE MASON,
Defendant's Attorney.

VIII. AGREEMENT TO TRY BEFORE A JUDGE WITHOUT A JURY.

GEORGE B. NEWTON COAL COMPANY
vs.
JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad.

C. P. No. 4.
June Term, 1921.
No. 1369.

AND NOW, October 19th, 1922, it is agreed by and between the parties to the above action, that trial by

jury be dispensed with, and that the above case be tried before a judge of this court, under the Act of Assembly in such case made and provided, the trial judge to enter such judgment as shall be necessary and requisite to enforce his decision under this agreement, subject to appeal, at the option of either party.

ALLEN S. OLMSTED, 2ND,
Plaintiff's Attorney.
WM. HOUGHTON JAMES,
Defendant's Attorney.

IX. EVIDENCE.

Monday, December 18th, 1922.

Before FINLETTER, *J.*

Present:

ALLEN S. OLMSTED, ESQ., and
HORACE MICHENER SCHELL, ESQ., for Plaintiffs.
WILLIAM CLARKE MASON, ESQ., for the Philadelphia & Reading Railway.
CHARLES MYERS, ESQ., for the Pennsylvania Railroad.

It is agreed that the evidence taken in the case of the George B. Newton Coal Company versus the Pennsylvania Railroad shall be considered as if taken in the case of the Philadelphia & Reading Railway, so far as it relates to the general situation, but, in so far as the evidence relates to the particular cars of coal used by the Pennsylvania Railroad, that evidence shall be exclusive to that case; and, in so far as it relates to the cars used by the Philadelphia & Reading Railway, that evidence shall be exclusive to that case.

The action of the railroad companies defendants was taken in consequence of certain Presidential Orders purporting to have been issued under the authority of the Acts of Congress, as those orders will be agreed upon by counsel, the forms to be submitted later.

THE COURT: I understand, gentlemen, that will leave for discussion in the testimony the offering of proof on two questions, first, whether or not there was any market price for coal at the time of the alleged conversion, and, secondly, what was that market price.

RAYMOND Y. WARNER, having been duly sworn, was examined as follows:

By MR. OLMSTED:

Q. What is your position?

A. Vice-President and Treasurer of the George B. Newton Coal Company.

Q. How long have you been with the George B. Newton Coal Company?

A. Since 1912.

Q. You have been in the coal business longer than that?

A. Yes, sir.

Q. How long?

A. Since 1891.

Q. What are your duties with the George B. Newton Coal Company?

A. I look after the purchase of the coal and the financial matters concerning the company.

Q. What is the business of the George B. Newton Coal Company?

A. Coal—selling coal.

Q. Does it sell principally at retail, or wholesale?

A. Principally at retail, but some wholesale.

Q. It sells both bituminous and anthracite coal?

A. Yes, sir.

Q. The greatest volume of it is in trucks delivered at the bin of the consumer?

A. Yes, sir.

Q. From whom do you buy your coal? Confine your answers to bituminous coal.

A. Do you mean at the present time?

Q. In the year 1920 from whom did you buy your coal?

A. We were buying from Berwind-White Coal Mining Company, the Consolidated Coal Company—

Q. First, as to the Berwind-White Company, did you have a written annual contract with the Berwind-White Company?

A. Not during the first three months of 1920.

Q. What was your arrangement in buying from them?

A. That we were to place orders with them at the different yards, and they would use their best endeavors to ship it as we ordered the coal. It was assumed that their tonnage would run up to about as much as we had been purchasing from them during the previous years.

Q. Coal which was taken by the Director General, the car numbers of which are given in your statement of claim, was all that coal that was shipped by the Berwind-White Company under that arrangement?

A. All that was confiscated?

Q. Yes, all that was mentioned in the statement of claim as being shipped by the Berwind-White Company?

A. Yes, sir.

Q. Under your contractual arrangement with the Berwind-White Company, at what point did the title to the coal change?

Objected to.

Q. What arrangement did you have with regard to the delivery of coal? Under the terms of the coal contract where did you take title to the coal?

Objected to.

Objection sustained.

Q. Under the agreement, where was the coal to be delivered to you?

A. It was to be delivered to our various yards.

Q. It was delivered at your various yards by the railroads, was it not?

A. Yes, sir.

Q. Where was the coal delivered to you, not by the railroad, but by the Berwind-White Company? In other words, at the mines, or at destination?

A. It was delivered by the Berwind-White Company to the railroad, and the railroad in turn delivered it to us.

By The Court:

Q. You paid a certain price?

A. At the mines—f. o. b. mines.

By Mr. Olmsted:

Q. You paid the freight charges yourself?

A. The freight charges followed the coal, and we paid them on the arrival of the coal.

Mr. Olmsted offered in evidence the affidavits of defence in the two above described cases, that of Newton vs. Pennsylvania Railroad and Newton vs. Philadelphia & Reading Railway.

Q. When the Berwind-White Company shipped a car of coal to you, did they send you any notice that that had been shipped?

A. Yes, sir.

Q. And you received those notices?

A. Yes, sir.

Q. You received it in the case of every car, whether mentioned in the statement of claim or not?

A. I believe we did, as far as my knowledge goes.

Q. At what price did the Berwind-White Company sell you this coal? I am speaking of the Berwind-White coal mentioned in the statement of claim. It is shown in the statement of claim as $2.95. Is that correct?

A. Yes, sir; that is correct. $2.95 per net ton, f. o. b. car at mines.

By The Court:

Q. What do you mean by net ton?

A. 2000 pounds.

By Mr. Mason:

Q. All bituminous coal is sold at that tonnage?

A. Yes, sir.

By Mr. Olmsted:

Q. What arrangement did you have for the purchase of coal from W. C. Huber & Company, the Commercial Coal Mining Company, the Pennsylvania Coal & Coke Company, Whitney & Kemmerer, Madeira, Hill & Company, and the Consolidation Coal Company?

A. We had written contracts with all those companies, with the exception of the Pennsylvania Coal & Coke Company, which was verbal.

Q. Do you have those contracts with you?

A. Yes, sir.

Contracts produced.

Mr. Olmsted offered in evidence the contracts produced by the witness, for the purpose of showing the dates of purchase, the price of the coal, and the places of delivery, which are as follows:

W. C. Huber & Company, $3.20 f. o. b. cars mines, Commercial Coal Mining Co., $3.00.

Note: The above prices are per net ton, f. o. b. mines.

THE WITNESS: As to the Pennsylvania Coal & Coke Company there was no written contract covering them.

Q. What was your arrangement with the Pennsylvania Coal & Coke Company?

A. That was the same as with Berwind-White.

Q. What was the price at which you had agreed to buy that coal under your verbal arrangement?

A. It was $2.95.

Q. That coal also came to you f. o. b. mines?

A. F. o. b. mines.

This contract with Whitney & Kemmerer covers two different kinds of coal.

By THE COURT:

Q. Are they both involved in this case?

A. No; only one kind.

Q. Give us the price of that involved in this case.

A. That was $2.97 f. o. b. mines, net ton.

By MR. OLMSTED:

Q. What kind of coal was that $2.97?

A. Bituminous coal.

Q. Can you tell the grade of bituminous coal?

A. It is known as three-quarter inch gas coal.

Q. Is that coal a pool number?

A. I couldn't tell you that, I do not know.

Q. What about Madeira, Hill & Company?

A. $3.21 a net ton. That is Elizabeth coal.

Q. The Consolidation Coal Company?

A. $3.78 a ton.

Q. All of these contracts called for the supply of a definite amount of coal?

A. Yes, sir.

Q. So much per month?

A. They were in regular monthly shipments.

Q. Were the shippers of coal under your monthly contract behind on their deliveries, or were they up to the contract obligations?

A. They were behind.

Q. Did your Company receive notices of the shipments of the coal in question from the companies also?

A. Yes, sir; we did.

Q. What kind of coal was that shipped under the Berwind-White arrangement?

A. It was high grade, low volatile coal, one of the highest grades of coal in the market.

Q. What is commonly known as Pool 1 coal?

A. Yes, sir. Their coal is all classed as Pool 1. I never bought it as that.

Q. Was the coal shipped by the Consolidation Coal Company, the Commercial Coal Mining Company, the Pennsylvania Coal & Coke Company, Whitney & Kemmerer, Madeira, Hill & Company, and Huber & Company all a high grade or a low grade of coal?

A. It was all a high grade, but not as high as the Berwind-White coal.

Q. Did your Company receive notices that all of the coal mentioned in the statement of claim had been confiscated by the defendants, the Director General of Railroads?

A. We did.

Mr. Mason requested that Mr. Olmsted produce the form of notices referred to.

Mr. Olmsted produces papers, which he states are the usual forms, but he reserves the right to submit other forms if there is a substantial difference. The forms produced do not relate to any particular car in suit.

The forms produced are as follows:

ALLEGHENY REGION COAL DISTRICT
Broad Street Station
Philadelphia, April 20, 1920.
File CC-Sheet No. 611

Dear Sir:

Car Initial and Number P&R 76395
Shipped by Date 3-20
From Waldo #1 W.Va. Mine, to Philadelphia
Consigned to Has been diverted to PRR at Cumbo, W.Va.
by order of the United States Fuel Administrator.

Allegheny Regional Coal Committee
By

Madeira Hill & Co.	G. W. Newton Coal Co.
(Shipper)	(Consignee)
North American Bldg., Phila.,	Philadelphia
(Address)	(Address)

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads

Philadelphia and Reading Railroad
Central Railroad of New Jersey
New York and Long Branch Railroad
Atlantic City Railroad
Port Reading Railroad
Office, Superintendent Transportation
Reading Terminal, Philadelphia.

March 8, 1920
File X-3

Berwind White Coal Mining Co.,
Commercial Trust Bldg.,
Phila., Pa.

Gentlemen:

The following cars of bituminous coal shipped by you on dates named have been diverted to this railroad for our supply:

Car Initials and Number		From date	Original Consignee
BWCMC	3820 3-2	George B. Newton Coal Co., 12th & York Sts., Phila.	
"	2859 3-3	"	" " "
"	3477 "	"	" " "

Please send your bill to me for prompt attention.

Yours truly,
O. W. Stager,
Superintendent Transportation

G. B. Newton Coal Co.,
Bank Bldg.,
Phila, Pa.

By The Court:

Q. The paper marked Form M, apparently comes from the Allegheny Regional Coal Committee, and is signed by the chairman. What was the Allegheny Regional Coal Committee?

A. I couldn't say that I am prepared to answer that question.

Q. Is that a governmental body?

A. That is the Fuel Administration.

Mr. Olmsted: The affidavits of defence offered in evidence admit the cars of the numbers stated in our statements of claim, and the quantity of coal stated, were shipped on the dates stated in the affidavits, and to the destinations shown in the statements. And they admit the coal

was diverted. And I understand it is agreed that it was diverted to the Fuel Administration and consumed by the defendants. That is, converted pursuant to the orders of the Fuel Administration and consumed by the defendants.

Mr. Mason: There is no dispute concerning the exhibits attached to the plaintiffs' statements of claim in either case as showing the tonnage and the name of the shipper and the destination and the price which represents the cost of the coal, except that as to the claim in the Reading case, it is contended by the defendants that the car MC 10545, shipped by Madeira, Hill & Company on February 25th, 1920, containing 101,200 pounds, at a total delivered cost as set forth in the statement, of $235.45, was a car of coal consigned to the defendants for fuel purposes, and was not a car consigned to George B. Newton & Company for which a charge should be made here. The facts as to that car are subject to adjustment later.

Defendants, the Philadelphia & Reading Railway, admits the correctness of the figures as to the other cars in the statement of claim.

By Mr. Olmsted:

Q. What was the total cost which the plaintiffs, George B. Newton Coal Company, was obligated under its contracts to pay for the entire eighty cars mentioned in the statement of claim as having been confiscated by the Pennsylvania Railroad?

A. $22,875.22.

Q. The total cost of the cars confiscated by the Philadelphia & Reading Railway was also as shown in the statement of claim?

A. Yes, sir. I haven't that here.

MR. MASON: $9,411.62, subject to verification as to the one car heretofore referred to.

By MR. OLMSTED:

Q. Including in your supply all of the coal which you actually had in stock and which you actually received, and all of the coal which was confiscated by the railroads, did you have orders for the sale of a volume of coal greater or less than that amount?

Objected to.

By THE COURT:

Q. Had you orders to sell all of this coal?

A. Yes, sir.

Q. Including all you had in stock?

A. Yes, sir.

Objection overruled. Exception noted for defendant by direction of the Court.

MR. MASON: The reason for the objection is that there is no notice to the defendants of that fact, and it cannot be used to increase the normal damage.

By MR. OLMSTED:

Q. Your contracts to sell the coal were not to wholesale it in carload lots, but to sell it in your general trade, were they?

A. Yes, sir.

Q. You have contracts for the sale of the coal at that time?

A. We have mosts of them here; yes.

Contracts produced in response to call of defendants' counsel.

Q. How many contracts did you have for the sale of coal?

A. Seventy-one.

Q. How much was the total per month which you contracted to sell under all of those contracts?

A. Our selling contracts aggregated about 14,000 tons a month.

Q. How much of a supply did you contract for?

A. The amount received on the contracts was about 12,188 tons monthly.

Q. Is it true that even if none of these contracts had been confiscated you would have had to go on the open market and buy a certain amount of coal to fulfill your contracts for the sale of coal?

A. Yes, sir.

Q. Therefore, every car confiscated just increased by that much the amount of coal you had to buy on the open market?

A. Yes, sir.

Q. What did you do when you began to get these notices from the Government that the coal had been confiscated, from the Railroad Administration?

A. I immediately set about to replace the coal by purchasing other coal.

Q. What did you do in order to get this coal?

A. I got in touch with everyone I thought had coal, and tried to buy it, and I did buy it, but, of course, at a very greatly advanced price.

Q. Did you buy as much coal as was confiscated by the railroads?

A. Yes, sir.

Q. How much did you pay for the coal which you bought to replace the coal which was confiscated?

MR. MASON: I object. It has been stated by the witness that in any event he would have had to go in the market and purchase coal to fulfill his contractual obligations, and, until there is some evidence here that a purchase was made of the full

amount in the open market to meet all of his contractual obligations over and above what was actually delivered, there is no sufficient demonstration by this evidence that this coal was purchased to meet just diversions rather than to meet the other purchases necessary. The mere fact of a purchase in the open market does not, it seems to me, go far enough.

By Mr. Olmsted:

Q. You bought coal in the open market both to cover the cases of the contracts for coal over the contracts of purchase, and to replace this confiscated coal, did you not?

A. Yes, sir.

Q. Could it be said that any particular ton or any particular car of coal which you purchased was purchased to replace any particular ton of coal or car of coal which was confiscated?

A. No, sir.

Q. So that in computing the cost of the coal which you bought to replace this amount confiscated, how did you work your computation?

A. We took the entire cost of the coal confiscated, and took a like amount in tonnage of the first coal purchased, and set off against that. Of course, it left more coal which we had purchased at the end, so to speak.

Q. Beginning from the time that these confiscations started first, we will say, the first ten thousand tons of coal, figured equal to the amount which was confiscated, the first coal which you bought in the open market you allocated against that which was confiscated, did you?

A. Yes, sir.

Q. The cars which you later purchased you allocated against the cars over the amount for which you had contracted?

A. Yes, sir.

Q. During the time these cars were confiscated and the time you were replacing it with other coal, was the price of coal going up or down?

A. The market was going up.

Q. So that consequently the first car taken was of a lower price than the cars that were later allocated?

A. Yes, sir.

Q. I renew my question. How much did you pay for the first 13,974,400 pounds of coal confiscated after these coal confiscation orders started to come in?

Objected to. Objection overruled.

Exception noted for defendant by direction of the Court.

A. $6.44 delivered. That covers the cost of freight.

Q. $6.44 per net ton delivered in Philadelphia?

A. Yes, sir.

Q. That includes further the freight charges?

A. Yes, sir; everything.

Q. You have been in the coal business how long?

A. Since 1891.

Q. During that time have you bought and sold coal?

A. Yes, sir.

Q. Are you, therefore, familiar with the terms of the coal market?

A. Yes, sir.

Q. In 1920 were you familiar with the coal market?

A. Yes, sir.

Q. And particularly in February and March of 1920 you made special inquiries for the purchase of coal?

A. Yes, sir.

Q. Do you consider you are, therefore, familiar

with the lowest price at which spot coal was delivered at that time?

A. I think I was in sufficient touch with the market to know.

Q. In your opinion, and according to your investigation and experience, what was the market price of coal delivered in Philadelphia at the end of February, 1920?

Objected to. Objection overruled.

Exception noted for defendant by direction of the Court.

A. Do you mean at the beginning of this period?

Q. At the end of February, 1920.

A. Of course, the best guide I would have would be the prices I paid for the coal which I enumerated here, and the average of that was $6.44.

Q. Was the coal which you bought to replace the coal which was confiscated by the railroads better or worse than the coal that was confiscated?

A. That was worse; of a lower grade.

Q. You actually paid for the coal which you replaced $6.44?

A. Yes, sir.

Q. In your experience, what was the market price of coal at the time which the railroads confiscated delivered in Philadelphia in the latter part of February, 1920?

Mr. Mason: That means Berwind-White and Madeira Hill, and coal of that sort.

A. I do not believe I could answer that question, because I do not know. I do not think there was any available. You could not buy coal from Berwind-White or any of the coals of that character that I know of.

Q. You did get some spot coal?

A. This was all spot coal.

Q. What is spot coal?

A. Coal that is here in Philadelphia.

By The Court:

Q. On the spot?

A. Yes, sir; and can be transferred from one point to another, for quick delivery.

By Mr. Olmsted:

Q. You say spot coal is more valuable?

A. Yes, sir; more valuable because you can get immediate delivery.

Q. Was there any danger that the coal you had on hand would be taken by the railroads?

A. I would go to the office and find notices from the railroad that they had probably confiscated ten cars or so, and we were counting on that coal coming in, and on account of it being confiscated when it was shipped from the mines, I had to go nearer by.

Q. Even if it was shipped from the mines, that might be taken by the Administration?

A. Yes, sir.

Q. Whereas spot coal meant coal here in Philadelphia?

A. Yes, sir.

Q. I do not suppose you bought all the spot coal in Philadelphia at that time?

A. No; I don't think so.

Q. Confirming your attention to the market on that spot coal, can you say that the market price was $6.44 a ton, or greater?

Objected to.

Q. I understand you to say that the market was $6.44 or higher for this quality of coal?

A. Yes, sir.

Cross-examination.

By Mr. Mason:

Q. As I understand, you had no written contract with Berwind-White during this period?

A. That is correct.

Q. What they agreed to do was, to send you as much coal as they could of the kind that you wanted?

A. Yes; to fill our orders if possible.

Q. So that you were not in a position to rely on Berwind-White as the course of supply for coal covered by a contract of a nature that you could enforce against them?

A. No, sir.

Q. With respect to these other contracts, I see that the Madeira Hill contract provides that it is subject to the rules and regulations of the United States Fuel Administration? That is in the Madeira Hill contract, is it not?

A. This is not the one. The other contract is the one covered.

Q. That seems to have the same provision in.

A. It has the same clause; yes, sir. "It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administration, dated December 24th, 1917, and effective December 29th, 1917, all of the terms and provisions of which are hereby incorporated herein, with the same force and effect as if the same were set forth at length."

Q. And the contract with Whitney & Kemmerer contains the provision that this contract is subject to any rules and regulations which may be made by the United States Fuel Administration, does it not?

A. Yes, sir.

Q. In the Consolidation Coal contract there is a

provision, is there not, that that was also subject to the United States ruling?

A. Yes. "This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as if set forth at length."

Q. The Commercial Coal Mining contract has in it this provision, has it not, "That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919"?

A. Yes, sir.

Q. You were familiar with the regulations of the United States Fuel Administration, and with the operation under them, were you not, during the period in controversy, the first three months of 1920?

A. In a general way; yes.

Q. You were particularly familiar with the provision of the regulation of January 17th, 1919, in effect as of that day, wherein it was provided, "That every such contract shall provide that a car of coal deliverable thereunder shall be subject to requisition by the United States Fuel Administrator or his representatives, including under the term 'requisition' the right to divert such coal to any other party than the purchaser named in the contract; that such requisition may be made at any time during the continuance of the contract, and prior to actual receipt and unloading of the coal or coke so requisitioned at the point of ul-

timate destination by the person entitled thereto under the terms of the contract; that such requisition shall be made at the going Government price in effect at the date of shipment for the particular shipment of the coal or coke so requisitioned; or, if on the date of such shipment there is no going Government price for the coal or coke so requisitioned, then at the price at which such shipment has been consigned by the shipper thereof and without other or further liability of the Government or the requisitionee to either party to the contract than the payment of the price at the time as hereinbefore in this paragraph provided, and transportation and other like charges paid or agreed to." You are familiar with that provision?

A. In a general way. Of course, all those details I do not remember.

Q. You were in business in anthracite and bituminous coal during this period?

A. I was.

Q. Is it not true that at your request to meet the exigencies of your trade, the Fuel Administrator issued orders diverting coal consigned to others to your Company?

A. I have no recollection of any during that period.

Q. Do you mean during the period from November 1st, 1919, when the new Fuel Administration regulation went into effect, down to March 1st, 1920, that there were no such diversions made for your benefit?

A. I could not answer that question, because I do not remember.

Objected to. Objection overruled.

Exception noted for plaintiffs by direction of the Court.

Q. Look at that requisition for diversion signed by George B. Newton.

MR. OLMSTED: I object. That is November 6th, 1919.

Objection overruled. Exception noted for plaintiffs by direction of the Court.

A. This no doubt came from my office. There were other cases, I assume, of that same kind at that time.

By MR. MASON:

Q. That continued down, did it not, for a substantial quantity of coal that was diverted from other consignees to your corporation?

A. I do not know that was diverted from other consignees. As I remember that, the natural procedure was to send to this committee requisitions for coal for certain customers who were on the preferential list. There were certain industries which received preferential treatment.

Q. Where was the coal to come from?

A. I do not know. That says Berwind-White, does it not? I think that was more to get shipments made instead of having it diverted. Because, they were only shipping to certain preferential industries.

Q. Do you have knowledge of the fact that your company did get coal that was diverted from other consignees during the period when the regulations were in effect, and did make settlement with the shipper for such coal?

Objected to. Objection overruled.

Exception noted for plaintiffs by direction of the Court.

A. I have no knowledge offhand of that. I would

not say that there has not been, because I would have to look that up to see.

Q. Were you not treasurer of the company during this period?

A. Yes, sir.

Q. During that time did you not make payments to shippers other than the shippers you have referred to here?

A. Yes, sir.

Q. Were not a number of these payments made for coal that was not originally shipped to your company, but was diverted to you from some other consignees?

A. I couldn't tell you that, because we very likely would not know it if it was done through this committee. We would receive the coal and the bill would come from the shipper, but we would not know whether that had been transferred en route or had been shipped direct to us.

Q. Where, however, it was with a shipper with whom you had not placed an original order yourself, it might have been coal diverted from others, might it not?

A. It might have been; yes, sir.

Q. In those cases your settlements were made with the shippers on the basis of the Government price, were they not?

A. I could not answer that question. I do not know.

Q. That was the universal way of making such settlements, was it not?

A. That was the usual way; yes.

Q. With reference to purchases we have spoken of, were those purchases made from the shippers, or from persons in Philadelphia who had accepted deliv-

eries of coal, engaged in the retail business, or otherwise?

A. Do you mean this high-priced coal?

Q. The coal that you purchased to replace the coal that was not delivered.

A. It was all from recognized coal houses. I think in this case most of it from middle houses.

Q. From jobbers in coal?

A. Yes, sir.

Q. Is it not true that during the three months of January, February and March of 1920 that there was a price for coal fixed by the United States Fuel Administration as the Government price?

A. There was a price, yes, but it seemed to be the opinion of everyone that that was not sustained in actual law. In fact, I think Chief Justice Taft so stated that during that time.

Q. Is it not true that that was the price that was recognized as the value for coal during that period?

A. No; I would not say that, because you could not buy coal at that price.

Q. Was it not generally recognized by most, if not all of the reputable shippers and producers, as the price at which coal was to be sold?

A. By a great many of them, but not by all.

Q. Is it not true that those who failed to recognize and act under it adopted the evasive means of meeting the situation by selling coal at the Government price, and then making some side agreement which could be covered up?

A. I am not aware of that. I had no transactions of that kind.

Q. When you speak of a market price, what do you mean?

A. To me that means the price at which you can purchase coal.

Q. What you did in this case, whenever you wanted to buy more than you have available to supply your needs, you went out and bought it wherever you could find it?

A. I did.

Q. And got the best coal you could get for the best price?

A. Yes, sir.

Q. And you found that there were all kinds of prices, did you not?

A. There were not so many prices; there was very little coal to be had, that was the trouble.

Q. During that period did you buy spot coal at the Government price?

A. None whatever.

Q. When you speak of paying $6.44 for this coal, that does not mean that you paid $6.44 for the tons of coal that were to supply this coal that was diverted and used for railroad and fuel purposes? It means that that was the average price that coal cost you during that period, does it not?

A. Yes, sir.

Q. Do you know whether the coal that was shipped from Berwind-White was destined for any particular customer of yours?

A. No; it was shipped to our yards, but for delivery to our regular trade, people with whom we had contracts.

Q. That regular trade that you speak of, those were all people from whom you had taken orders to supply them with coal, but, is it not true that during this period you protected yourselves by an understanding with your customers that it might be that the coal that you contracted for would not be delivered to you, and that you would have to reduce their deliveries in proportion?

A. Our contracts provide—of course, they have a strike clause in them—but we do not consider that we have done our duty to our customers without we have exhausted every means of obtaining coal for them and getting them their full supply.

Q. You make the effort to fulfill the needs of your customers?

A. Yes, sir.

Q. They were advised by you, were they not, of the existence of the United States Fuel Administration regulations, and were they not told by you that you would have difficulty in getting coal to supply their needs, that you might not be able to fully comply with their needs?

A. That I do not know, because that would come under the selling end, and I had nothing to do with that.

Q. Your contracts provided, of course, that they were subject to legislation affecting the cost of production or delivery, did they not?

A. Yes; as in the contracts.

MR. MASON: As I understand it, we have agreed that the payments made to the shippers mentioned in the statements of claim filed in both cases, were made by the Director General of the two railroads concerned in full for the amounts set forth in the statements of claim?

MR. OLMSTED: Yes.

By MR. MYERS:

Q. What price did you charge your customers for the coal which you sold them?

Objected to. Objection overruled.

Exception noted for plaintiffs by direction of the Court.

A. It was at various prices; not all the same. You have the contracts right there.

Q. You charged them the contract price in the cases where you had contracts?

A. Yes, sir.

Q. In cases where you did not have contracts, what did you charge them?

A. All this coal was covered by contracts.

Q. It was more than covered by the contracts?

A. Yes. There were some few which we had no written contract with, but who had verbal contracts along the lines of Berwind-White's, that we would keep them going. There was a difference. I do not know just what that would amount to.

Andrew Atwood Zane, having been duly sworn, was examined as follows:

By Mr. Olmsted:

Q. What is your business?

A. Coal and coke.

Q. What has been your experience?

A. I have been connected with the coal business since 1892; from 1892 to 1902 with the Reading Railroad in the Coal Traffic Department; from 1902 to 1912 with J. H. Weaver & Company, coal operators; from 1912 to 1916 with F. W. Feodisch & Company, coal and coke; and since 1916 in business for myself.

Q. Are Foedisch & Company wholesalers or retailers of coal?

A. Wholesalers.

Q. Located here in Philadelphia?

A. Yes, sir.

Q. Your business consists in buying and selling coal at wholesale, does it?

A. Yes, sir.

Q. Were you in that business in the spring of 1920?

A. Yes, sir.

Q. And in the winter of 1920?

A. Yes, sir.

Q. Did you make purchases of coal and sales of coal at wholesale during that period?

A. Yes, sir.

Q. In the course of your business do you have to familiarize yourself with the market conditions?

A. I have; yes, sir.

Q. Are you familiar with the market conditions in February and March of 1920?

A. Yes, sir.

Q. And thereafter?

A. Yes, sir.

Q. Have you made any investigation as to market prices at that time?

A. Yes, sir.

Q. Did you hear Mr. Warner's testimony as to the kind of coal which was confiscated by the railroads?

A. I did.

Q. In your experience and judgment, what was the market value of that coal at Philadelphia at the end of February, 1920?

A. I would have to figure out. I would base that on about $4.50 a net ton at the mines. That would be practically $5.00 plus $2.20 per gross.

Q. The value at Philadelphia would be $5.00 per gross ton, plus $2.20?

A. $4.50 a net ton would figure about $5.00 gross, plus $2.20.

Q. That would be about $7.20 per gross ton at Philadelphia?

A. Yes, sir.

Q. After the end of February, 1920, did the market price of coal go up or down?

A. It went up.

Q. How high did it go in April and May of 1920?

A. The prices were around six to eight dollars at the mines—six and seven and a half possibly per net ton at the mines.

Q. Did the price continue high for several months after that?

A. Continued going up until it reached from $12.50 to $15.00 in September and October.

Q. Have you yourself actually made purchases and sales at the prices which you mentioned as the market value?

A. Yes, sir.

Cross-examination.

By Mr. Mason:

Q. You say that at the end of February, 1920, the market price at the mines was $4.50?

A. A net ton.

Q. Is it not true that at that time the Federal Fuel Administration so-called Government price was $2.60?

A. $2.95.

Q. Was not the Government price the controlling price at the mines during that period?

A. Not at that time. It would be the controlling price among some operators who lived up to the Government price, but, being a jobber, or any other jobber, would have had to close his office if he tried to do business on the Government price, because it was impossible. He could not buy it.

Q. There were producers of coal who recognized the Government price as the value fixed by the Government at that period?

A. Yes, sir.

Q. That price was $2.95?

A. $2.95.

Q. When you speak, therefore, of market price being the higher price, you mean that there were others who sold their coal at $4.50 to purchasers who were willing to pay it?

A. Oh, yes.

Q. Was there any such thing during that period as a market price for a ton of bituminous coal?

A. It depends on the grade, if you could get it, any price that you would have to pay would be a market price.

Q. What you mean by the higher market price is the price that you had to pay to the man you were buying a ton of coal from?

A. Yes, sir.

Q. When you say you have bought and sold in February, 1920, coal at the rate of $4.50 a net ton at the mines, you mean that is the price that you were compelled to pay for that coal?

A. Yes, sir.

Q. It may have varied up or down depending upon the mine you were dealing with?

A. And the quality.

Q. And the mine?

A. And the mine.

Q. So that while you were able to buy it at the Government price, at $2.95 from those mines that were selling it at that price, if you bought from some others you were forced to pay higher prices?

A. I was not able to buy at Government prices in those months.

Q. Not in those months at all from those who were selling at Government prices?

A. There was not any such thing.

Q. You mean so far as you were concerned?

A. I mean pretty generally.

Q. You have already told us that there were mines that did sell at Government prices?

A. Taking care of their regular trade. You could not buy in the open market any of their coal.

Q. In the open market it was a question of paying what was agreed upon between the purchaser and seller at the time the purchase was made?

A. Yes, sir.

Q. That varied around $4.50 up and down?

A. No; it varied owing to the different conditions. If you were going to have coal shipped from the mines it would probably be a cheaper price. If you needed coal over night and had to go to one of the piers to secure it and had to have it sent over the line, that would control it.

By Mr. Olmsted:

Q. The coal which changed hands at Government prices was contract coal, was it not?

A. I do not know. That is a supposition on my part. I imagine that is the case. I do not know.

Q. To get coal for which you had not made a previous contract, coal delivered in Philadelphia, what is known as spot coal, you had to pay as much as the market price to which you have testified?

A. Yes, sir.

By Mr. Mason:

Q. That was because you were buying that coal from jobbers or from shippers who were not complying with Government regulations?

A. They could not have been complying, if there were any regulations, with any regulations.

By Mr. Olmsted:

Q. If you had gone to any coal dealer, or any person who wanted coal, and offered $2.95 plus the freight charges for spot coal delivered in Philadelphia at the end of February, 1920, about how much would you have gotten?

A. From my own personal experience I would not have gotten a ton.

Plaintiffs Rest.

DEFENDANTS' EVIDENCE.

George D. Foedisch, having been duly sworn, was examined as follows:

By Mr. Mason:

Q. What is your business?

A. Coal and coke.

Q. Under what name do you trade?

A. Whiteley & Company.

Q. How long have you been in business?

A. I have been in the present firm since January 1st, 1921.

Q. How long have you been in the coal business?

A. Since February, 1903.

Q. In the years 1919 and 1920, were you in any way associated with the United States Fuel Administrator?

A. In 1919 and 1920, yes, I was appointed by Dr. Garfield as the representative of the Allegheny Regional Coal Committee in Broad Street.

Q. What was the Regional Coal Committee?

A. The Regional Coal Committee was appointed by the Director General; Dr. Garfield appointed Mr. Hines, then Director General, as the fuel distributor of the coal for the United States, and Mr. Hines, in turn, appointed regional coal committees, of which the Allegheny Regional Committee was one and covered this territory here.

Q. Are you familiar with the effect of regulations upon coal that has been diverted from one consignee to another?

A. The first order that Mr. Hines put out, he seized every car of coal that was in transit, subject to the order of the committee. That was on the first of November, I believe.

Q. Those committees acting under the stress of necessity, apportioned that coal out to the points and persons where it was most needed; is that the idea?

A. Yes, acting under rules as put out by the Central Coal Committee in Washington.

Q. What was the occasion for the action by the Fuel Administration from November 1st, 1919, down to November, 1920? What was the occasion for such action?

A. It was brought about by the strike, and necessarily a shortage was created.

Q. There was during that period, the latter part of 1919, and practically all of 1920, a situation where there was a shortage of coal for the needs of the country?

A. Unquestionably; yes.

Q. The result of those regulations, and the actions of the Fuel Administration caused coal that was consigned to one man to be diverted to another?

A. That was the result of the order; yes, sir.

Q. In the settlements that were made universally

throughout the trade as a result of those diversions under the rules of the Fuel Administration, payments for such coal were made by the person receiving it to the original shipper, were they not?

A. Yes. I think there is an order providing for that.

Q. Those settlements and payments were made in shapes, you know, according to the so-called Government price fixed by the Fuel Administration, were they not?

A. I believe so.

Q. During that period of time you were familiar with the coal industry here in Philadelphia, were you not?

A. I was more active on distribution. During that period I spent the most of my time in Broad Street, on distribution, and, therefore, would not be qualified on market conditions.

Q. For instance, take the first three months of 1920. Were you familiar with the so-called market for coal and the price at which coal was bought and sold?

A. Not entirely so, because I spent a great deal of my time in Broad Street.

Q. There was at that time, however, according to your own personal knowledge, a Government price for coal?

A. There was a Government price for coal.

Q. That price was $2.95, was it not?

A. Yes, sir; that is, for Pennsylvania Central coal.

Mr. Mason: It is agreed that the coal which was used by the two defendants here was paid for at the prevailing Government price.

Mr. Olmsted: If you mean by the "prevailing Government price" either the price fixed by the regu-

lations or the price arrived at under that other provision of the regulations which protected bona fide contracts entered into before October 1st, 1919, then it is so agreed.

MR. MASON: Yes.

JOHN C. KLINE, having been duly sworn, was examined as follows:

By MR. MASON:

Q. Where is your place of business?

A. No. 25 Beaver Street, New York.

Q. In 1920 were you engaged in the coal business?

A. Yes, sir.

Q. With what company?

A. W. A. Marshall & Company.

Q. That company has offices in New York and Philadelphia, has it not?

A. Yes, sir.

Q. How long have you been in the coal business?

A. Since 1915.

Q. Are you familiar with the purchase and sale of coal during 1919 and 1920?

A. Yes, sir.

Q. And the prices at which coal was purchased and sold during that time?

A. Yes, sir.

Q. Are you familiar with the Federal fuel regulations during that period?

A. Generally; yes.

Q. Do you know the effect on the coal trade?

A. Yes, sir.

Q. Tell us what was the market price for bituminous coal in Philadelphia during the first three months

of 1920, and by that I mean whether there was any other price for such coal as the market value thereof than the price fixed by the Fuel Administration?

A. There may have been other prices. The Government price was the market price at that time.

Q. And was it so regarded by those engaged in the business?

A. Yes, sir.

Q. Did you buy and sell coal at that price?

A. Yes, sir.

Q. Did others that you know of buy and sell coal at that price?

A. Yes, sir.

Q. Was it recognized as the controlling price during that period?

A. Yes, sir.

Cross-examination.

By Mr. Olmsted:

Q. You say you bought and sold coal at that price?

A. Yes, sir.

Q. You bought it in accordance with standing contracts with the coal operators?

A. Yes, sir.

Q. You sold it to your regular customers at that price?

A. Spot coal we bought at the Government price and sold at the Government price, plus the wholesale commission.

Q. Are you referring to the Government price of $2.95 at the mines?

A. From $2.35 to $2.95.

Q. Did you sell any coal in February, 1920, to persons not your regular customers at the price of $2.95 or less, plus 15 cents profit?

A. I would not say that unless I looked up the data.

Q. You have not looked up the data?

A. I would have to look up our records.

Q. You have not looked up your records?

A. No, sir.

Q. Do you know as matter of fact that if anyone went into the market to get coal in the fall of 1920, that it could not be had?

A. We bought it.

Q. You bought it from people with whom you had contracts?

A. No, sir; we bought it from people we always bought from.

Q. Your regular operators?

A. Yes, sir.

Q. Did you buy any from wholesalers?

A. I couldn't say unless I looked at the records.

Q. Do you know from your memory whether you tried to buy any coal from other wholesalers or jobbers?

A. We buy very little from wholesalers; we buy direct from the mines.

Q. The coal that you speak of as having bought at $2.95 or less, you bought entirely from the operators?

A. Yes, sir; from the operators.

Q. You are not able to say whether you bought a single ton of coal in the wholesale market here in Philadelphia at the Government price?

A. I couldn't say unless I referred to the records. We have bought coal from jobbers, it may have been during that period, at the Government price, plus commission.

Q. You say you may have?

A. We did buy.

Q. Do you know whether you did buy?

A. Yes, sir.

Q. You did buy coal from the jobbers?

A. Yes, sir.

Q. At Government price?

A. Yes, sir.

Q. Plus 15 per cent. commission?

A. Yes, sir.

Q. From whom did you buy that coal?

A. Various people up in Clearfield and Cambria County.

Q. I am talking about here in Philadelphia.

A. I couldn't say about here in Philadelphia; I wouldn't say that.

Q. Were you doing business in Philadelphia at that time?

A. Not personally; no. We have an office here. Our office is here.

Q. You personally were not in Philadelphia?

A. No, sir.

MR. OLMSTED: I move that the witness's testimony be stricken from the record, on the ground that he does not know anything about the market price in Philadelphia.

Motion refused.

Exception noted for plaintiffs by direction of the Court.

By MR. OLMSTED:

Q. Do you know of any sales made in Philadelphia between dealers at administration price?

A. Personally, no, sir.

MR. OLMSTED: I renew my motion to strike the witness's testimony from the record, because he does not even know of any other sales having been made at this price.

Motion refused.

Exception noted for plaintiffs by direction of the Court.

Re-direct-examination.

By Mr. Mason:

Q. As I understand it, you are the general manager of the Marshall Company?

A. Yes, sir.

Q. You do know the prevailing Government price?

A. Yes, sir.

Q. You do know that that price was observed by your Company and by others engaged in the coal business during the first three months of 1920?

A. Absolutely.

Q. You say that you cannot recall personally from memory a particular sale that was made in Philadelphia or elsewhere by you or others at that price, but, is it or is it not a fact that that was the price at which you gave your general instructions to buy and at which the business was conducted in the trade?

A. Yes, sir.

Q. You can furnish Mr.Olmsted, if he wants it, with the particular sales that you made at such price?

A. Yes, sir.

Mr. Olmsted: I want cases of sales from one wholesaler to another, and when he brings them, I want him to explain the circumstances under which they were made.

Re-cross-examination.

By Mr. Olmsted:

Q. You heard Mr. Zane's testimony to the effect that spot coal on the open market could not be obtained

at the Government administration price. I mean by that from dealers with whom there was no pre-existing contract.

A. Yes, sir.

Q. Is that your information?

A. I would not say. I do not believe that you could buy a large amount; no.

Q. Do you think that Mr. Warner could have replaced the coal which was confiscated by the railroad at the Government administration price in Philadelphia?

A. How much tonnage was there?

Q. About 14,000,000 pounds, 9,000 tons.

A. During what period was that?

Q. During February and March.

A. It depends on the time he was going to replace it. When were the cars diverted?

Q. They were diverted in the latter part of February.

A. Because April 1st they could be replaced.

Q. Before April 1st?

A. You mean before April 1st?

Q. Yes.

A. 7,000 tons? I couldn't say that. His old suppliers, if they could not give it to him, it would be hard for him to get it from anybody else.

Q. Do you not know as matter of fact that the price that he paid for the coal was just about as good as anybody could have expected to buy it at that time?

A. What was the price?

Q. He says $6.44 delivered, which is on the basis of about $4.40 at the mines—between $4.40 and $4.50 at the mines.

A. $6.44 delivered, and what was the freight?

Q. The freight was $2.20 per gross ton, plus three

per cent. was tax. The price $6.44 is the net ton price. I think you will find it figures out at that the price at the mines is approximately $4.45 per net ton.

A. That leaves $4.18 a gross ton.

Q. Yes; $4.44, a net ton price.

A. That is $4.42. I couldn't say. The market price, as far as we were concerned, was the Government price. We paid no more than the Government price.

Q. Would you have sold Mr. Warner that 7,000 tons of coal at that price?

A. Not unless we had taken him on our regular trade.

Q. You were unable to take care of your regular trade?

A. I could not be able to say unless I referred to my records. Our business covers New York, Canada and the West, and I could not tell from memory.

Q. You have already testified that there was great shortage of coal during that time.

A. A shortage of coal?

Q. Haven't you?

A. I don't know that there was any shortage. It was the price.

Q. During and after the coal strike it was difficult to get coal, was it not?

A. Yes, sir.

Q. That was the emergency you told Mr. Mason?

A. Yes, sir.

Q. Because, however, of that shortage, is it not a fact that it was impossible to go out into the open market and get coal at the Fuel Administration price?

A. No; it was not impossible.

Q. It was commercially impossible?

A. We bought at the Government price.

Q. In the open market?

A. I can't say whether during that period. I must refer to the records to be positive.

Q. Do you not know, as matter of fact, that coal was sold in a great many places in open violation of the Fuel Administration orders?

A. Do I know it personally?

Q. Do you not know that was done?

A. I have heard of it.

Q. Do you not know also that the legality of those regulations was being questioned by operators and wholesalers so that it was a very doubtful question as to whether it was effective or not?

A. We adhered to them. The regulations were there, and some wholesalers who violated them have been fined and punished.

Adjourned, subject to the request of either party for the purpose of adding to the record anything that may be needed.

AGREED STATEMENT OF SUPPLEMENTARY FACTS.

The following is agreed upon by the parties and shall be considered as evidence before the Court:

1. The plaintiff, The George B. Newton Coal Company, is a corporation incorporated under the laws of Pennsylvania and engaged, interalia, in the business of buying and selling bituminous coal in the City of Philadelphia.

2. Director General of Railroads operated The Pennsylvania Railroad and Philadelphia & Reading Railway from and including the 1st day of January,

1918, to and including the 28th day of February, 1920, under appointment from the President of the United States, as appears from the President's Proclamation placing the Railroads under Federal control, dated December 26, 1917, and in accordance with the provisions of the Act of Congress approved March 21, 1918, entitled "An Act to provide for the operation of transportation system while under Federal control, for the just compensation of their owners, and for other purposes."

3. During the months of January and February, 1920, there were shipped over the line of the Pennsylvania Railroad 80 cars of coal, of which the dates of shipment, the car initials and numbers, the shippers, the destination, the weights, the cost of the coal at the mines the freight rate, and the total delivered cost are stated in Appendix 1 attached to the Statement of Claim in the suit brought against James C. Davis, Director General of Railroads, Agent, as operator of The Pennsylvania Railroad, which Appendix shall be considered as having been offered in evidence.

4. During the months of January and February, 1920, there were shipped over the line of the Philadelphia & Reading Railway 33 cars of coal, of which the dates of shipment, car initials and numbers, shippers, destination, weights, cost of the coal at the mines, the freight rate, and delivered cost, are stated in Appendix 1 attached to the Statement of Claim in the suit brought against James C. Davis, Director General of Railroads, Agent, as operator of Philadelphia & Reading Railway, which Appendix shall be considered as having been offered in evidence. All of the coal mentioned in paragraphs 3 and 4 hereof was consigned to the plaintiff herein.

5. The price of the coal shipped, as aforesaid, over The Pennsylvania Railroad was $22,875.22, and the price of the coal shipped, as aforesaid, over the Philadelphia & Reading Railway was $9,411.62, which sums were paid by defendants, respectively, to the shippers of the coal on plaintiff's behalf.

6. On August 10, 1917, an Act of Congress of the United States known as Lever Law, was approved by the President of the United States, which purports in section 25 to authorize and empower the President of the United States and the Federal Trade Commission under certain circumstances, at certain times and for certain purposes, to fix the price of coal, allowing therefor the cost of production, including the expenses of operation, maintenance, depreciation and depletion, and adding thereto a just and reasonable profit, and to establish rules for the regulation of and to regulate the method of production, sales, distribution, apportionment or storage thereof among dealers and consumers.

7. On August 21, 1917, under authority of said Act, by Order, a copy of which is attached hereto marked Exhibit (1), the price of Pennsylvania bituminous run of mine coal was fixed at $2 per ton.

8. On the 23rd day of August, 1917, the President of the United States issued an Order, a copy of which is attached hereto marked Exhibit (2), appointing Harry A. Garfield Fuel Administrator.

9. On October 27, 1917, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (3), adding 45c. to the price of coal by the Executive Order of August 21, 1917.

10. On December 24, 1917, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (4), regulating the making of contracts by jobbers of coal and coke.

11. On January 14, 1918, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (5), relative to the price to be paid for coal by the divertee in case of diversion.

12. On February 12, 1918, the Fuel Administrator issued an order, a copy of which is hereto attached marked Exhibit (6), fixing the price at the mine for coal mined in operations in, inter alia, Somerset, Cambria, Clearfield, and that portion of Westmoreland County lying within a line extending from a point opposite the lower end of Tarentum Borough, North along the Allegheny River to the Kiskiminitas River, and along the Kiskiminitas River Eastward to the Conemaugh River, and continuing along the Conemaugh River to the county line of Cambria County, at $2.60 per ton.

13. On May 24, 1918, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (7), reducing prices of bituminous coal at the mine in all producing districts 10c. per ton.

14. On January 17, 1919, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (8), vacating the Order of December 24, 1917, and establishing a regulation relative to the making of contracts for the sale of coal or coke by operators, producers, jobbers, sales agents or purchasing agents of coal or coke.

15. On January 21, 1919, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (9), cancelling all outstanding requisitions for coal or coke as of January 31, 1919.

16. On January 31, 1919, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (10), suspending, with the exception of regulations mentioned therein, all rules, regulations, orders and proclamations issued or promulgated by or under authority of the President or of the United States Fuel Administrator.

17. On February 20, 1919, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (11), suspending from and after February 28, 1919, the Order of said Administrator of November 6, 1917, relative to tidewater trans-shipments of coal, and the Order of January 31, 1919, prohibiting the shipment of coal for reconsignment.

18. On October 30, 1919, the President of the United States issued an Order, a copy of which is hereto attached marked Exhibit (12), revoking and annulling the Fuel Administrator's Orders of January 31, 1919, and February 20, 1919.

19. On October 31, 1919, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (13), revoking certain prior Orders and restoring certain of his prior Orders, as therein enumerated, and designating the Director General of Railroads and his representatives to carry into effect the Fuel Administration Order of January 14, 1918, and to make such diversions of coal which the railroads under his direction may, as common carriers, have in

their possession as may be necessary for the requirements of the country.

20. On November 5, 1919, the President of the United States issued an Order, a copy of which is hereto attached marked Exhibit (14), ordering and directing that the United States Fuel Administrator shall, as occasion may require, restore, change or make such rules, regulations, orders and proclamations fixing the prices or regulating the production, sale, shipment, distribution, apportionment, storage or use of all coal or coke as in his judgment may be necessary.

21. On November 12, 1919, the Fuel Administrator issued an Order, a copy of which is hereto attached marked Exhibit (15), providing that coal diverted in transit shipped under a contract dated prior to October 30, 1919, shall be paid for by the party receiving the same at the price at which the shipper would be entitled to bill the same to the original consignee thereof.

22. On March 19, 1920, the President of the United States issued an Order, a copy of which is hereto attached marked Exhibit (16), ordering and directing that the Secretary of the Interior is authorized and directed to adjust, liquidate and pay all claims against the United States Fuel Administration.

23. All of the coal involved in this suit was mined in the counties enumerated in the Fuel Administrator's Order of February 12, 1918.

24. All of the coal involved in this suit was diverted by the defendants to the defendants for fuel, pursuant to Orders issued by Director General of

Railroads under the authority delegated by him by the Fuel Administrator's Order of October 31, 1919, and was consumed by the defendants as fuel necessary for the operation of the said railroads.

ALLEN S. OLMSTED, 2ND,
Attorney for Plaintiff.

WM. CLARKE MASON,
Attorney for Defendant, James C. Davis, Director General of Railroads, as Agent operating Philadelphia & Reading Railway.

JOHN HAMPTON BARNES,
Attorney for Defendant, James C. Davis, Director General of Railroads, as Agent operating The Pennsylvania Railroad Company.

EXHIBITS.

EXHIBIT No. 1.

Executive Order of the President of August 21, 1917, Effective Evening of August 21, 1917, Fixing Provisional Prices for Bituminous Coal at the Mine, Issued as Publication No. 2 of the United States Fuel Administration.

The White House,
Washington, 21 August, 1917.

The following scale of prices is prescribed for bituminous coal at the mine in the several coal-producing districts. It is provisional only. It is subject to reconsideration when the whole method of administering the fuel supplies of the country, shall have

been satisfactorily organized and put into operation. Subsequent measures will have as their object a fair and equitable control of the distribution of the supply and of the prices not only at the mines but also in the hands of the middlemen and the retailers.

The prices provisionally fixed here are fixed by my authority under the provisions of the recent act of Congress regarding administration of the food supply of the country which also conferred upon the executive control of the fuel supply. They are based upon the actual cost of production and are deemed to be not only fair and just but liberal as well. Under them the industry should nowhere lack stimulation.

Woodrow Wilson.

	Run of Mine	Prepared Sizes	Slack or Screenings
Pennsylvania	$2.00	$2.25	$1.75

EXHIBIT No. 2.

Executive order of the President of the United States, dated August 23, 1917, Issued as Publication No. 1, of the United States Fuel Administration, appointing H. A. Garfield, United States Fuel Administrator.

By virtue of the power conferred upon me under the act of Congress approved August 10, 1917, entitled "An act to provide further for the national security and defence by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and particularly for the purpose of carrying into effect the provisions of said act relating to fuel, Harry A. Garfield is hereby designated and appointed United States Fuel Adminis-

trator to hold office during the pleasure of the President.

Said Fuel Administrator shall supervise, direct, and carry into effect the provisions of said act and the powers and authority therein given to the President so far as the same apply to fuel as set forth in said act, and to any and all practices, procedure, and regulations authorized under the provisions of said act applicable to fuel, including the issuance, regulation, and revocation under the name of said United States Fuel Administrator of licenses under said act. In this behalf he shall do and perform such acts and things as may be authorized and required of him from time to time by direction of the President and under such rules and regulations as may be prescribed.

Said Fuel Administrator shall also have the authority to employ such assistants and subordinates, including such counsel as may from time to time be deemed by him necessary, and to fix the compensation of such assistants, subordinates, and counsel.

All departments and established agencies of the Government are hereby directed to co-operate with the United States Fuel Administrator in the performance of his duties as hereinbefore set forth.

The White House, 23 August, 1917.

Woodrow Wilson.

EXHIBIT No. 3.

Executive Order of the President of the United States of Oct. 27, 1917, Effective 7 a.m. Oct. 29, 1917, Issued as Publication No. 2-A of the United States Fuel Administration, Increasing, Subject to Conditions Stated in the Order, Prices at the Mine

for Bituminous Coal by the addition of 45 cents per ton.

The White House.
Washington, D. C., 27 October, 1917.

The scale of prices prescribed 21 August, 1917, by the President of the United States for bituminous coal at the mine, as adjusted and modified, by order of the United States Fuel Administrator to meet exceptional conditions in certain localities, is hereby amended by adding the sum of 25 cents to each of the prices so prescribed or so adjusted and modified, subject, however, to the following express exceptions:

(1) This increase in price shall not apply to any coal sold at the mine under an existing contract containing a provision for an increase in the price of coal thereunder in case of an increase in wages paid to miners.

(2) This increase in price shall not apply in any district in which the operators and miners fail to agree upon a penalty provision, satisfactory to the Fuel Administrator, for the automatic collection of fines in the spirit of the agreement entered into between the operators and miners at Washington, October 6, 1917.

This order shall become effective at 7 a.m. on October 29, 1917.

Woodrow Wilson.

EXHIBIT No. 4.

Order of the United States Fuel Administrator of Dec. 24, 1917, Effective 7 a.m. Dec. 29, 1917, Issued as Publication No. 16 of the United States Fuel Administration, Regulating the making of Contracts by Jobbers of Coal and Coke.

Washington, D. C., December 24, 1917.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated August 23, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs, that until further or other order of the United States Fuel Administrator, and subject to modification hereafter from time to time and at any time, the following regulations are established relative to—

Contracts for the sale of coal and coke.

A coal or coke operator or producer may, in accordance with these regulations, and not otherwise, make contracts for the sale of coal mined or produced, or of coke produced or made, by him with any consumer or other person including jobbers.

(1) No such contract shall provide for the delivery or supply of coal or coke over a period longer than one year; and such period of one year shall terminate at a date not more than 18 months from the date of actual execution of the contract.

* * * * * *

(4) Every such contract shall provide that the same shall be forthwith canceled and no further binding effect upon either party thereto, upon receipt of a request or an order from the United States Fuel Administrator for such cancellation, and that in case of such cancellation neither party to the contract shall be under any further liability to the other thereunder and that neither shall have any claim against the United States by reason of such contract or the cancellation thereof.

(5) Every such contract shall provide that coal

or coke deliverable thereunder shall be subject to requisition by the United States Fuel Administrator, including under the term requisition the right to divert such coal or coke to any other party than the purchaser named in the contract; that such requisition may be made at any time during the continuance of the contract and prior to actual receipt and unloading of the coal or coke so requisitioned, at the point of ultimate destination, by the person entitled thereto under the terms of the contract; that such requisition shall be made at the going Government price at the date of shipment from the mine of the coal so requisitioned or of the shipment of the coke so requisitioned from the place of production or storage thereof, and without other or further liability of the Government to either party to the contract than the payment of such price and freight, so far as either party to the contract may at the time of such requisition or diversion be liable for such freight payment.

(6) A jobber may make contracts for the sale of coal or coke owned by him, or to which he is entitled under contracts made by him with operators or producers in conformity with these regulations, at a price not exceeding the purchase price paid or payable by such jobber for such coal or coke under the limitations of the foregoing paragraphs numbered (2) and (3) plus such commission on coal (not on coke) as may, at the time of the shipment thereof from the mine where such coal is produced, be the then permissible jobber's commission. All such contracts by jobbers for the sale of coal or coke shall conform to the provisions and requirements in the foregoing paragraphs number (1), (4), and (6).

(7) Every coal or coke operator or producer and every jobber shall send within 10 days of the execution of any contract by him a certified copy thereof to the

United States Fuel Administrator at Washington, D. C., marked "Attention of legal department".

Cross Hauling.

No contract may be made, or if made hereafter will be recognized as valid, by the United States Fuel Administrator, which involves railroad cross hauling of coal, except in the case of gas coal or coal to be used for by-product purposes.

Oral Contracts.

Oral contracts for the delivery or supply of coal or coke will in no case be recognized by the Fuel Administrator as valid or binding upon either party thereto and are hereby prohibited.

Cancellation and Termination.

All and any contracts for the sale of coal or coke are subject to cancellation and termination at any time by the President or by the United States Fuel Administrator acting under authority of the President.

This order shall be effective December 29, 1917, 7 a.m.

H. A. Garfield,
United States Fuel Administrator.

EXHIBIT No. 5.

Order of the United States Fuel Administrator of Jan. 14, 1918, Effective 7 a.m., Jan. 15, 1918, Relative to the Price to Be Paid for Coal by the Divertee in case of Diversion.

Washington, D. C., January 14, 1918.

All shipments of coal, whether f. o. b. mines or otherwise, and all shipments of coke f. o. b. ovens or at place of storage or otherwise, shall be made subject to the diversion of such coal or coke by the United

States Fuel Administrator or any persons acting under his authority, to any persons or consumers, and for any of the purposes heretofore or hereafter authorized by him. The title of the purchaser, consignee, or consumer, in the case of any such shipments of coal or coke, which by custom or law might become vested at the time and place of such shipment, shall from and after the effective date hereof be subject to the condition that the coal or coke so shipped may be diverted as aforesaid, and that in case of any such diversion the title and interest of such purchaser, consignee, or consumer, with respect to any coal or coke so diverted shall be completely divested and terminated and his liability to pay therefor shall cease. The person or consumer to whom any such coal or coke is diverted shall become liable as of the time of such diversion to pay to the shipper thereof the price in force at the date of shipment as fixed therefor by or under authority of the President of the United States, plus transportation charges thereon and plus a handling charge of 15 cents a net ton to cover costs of rebilling, collection, and replacement. If such handling charge is made, no jobber's commission shall be added to the mine's price. If the coal or coke so diverted was shipped under a valid and enforceable contract, the quantity thereof so diverted shall not be charged against the amount to which the contract applied.

Effective at 7 a.m., on January 15, 1918.

H. A. Garfield,
United States Fuel Administrator.

EXHIBIT No. 6.

Order of the United States Fuel Administrator of Feb. 12, 1918, Effective 7 a.m., Feb. 16, 1918, Fix-

ing Price at the Mine for Coal Mined in Operations in Tioga, Lycoming, Clinton, Center, Huntingdon, Bedford, Cameron, Elk, Clearfield, Cambria, Blair, Somerset, Jefferson, Indiana, Clarion, Armstrong, Butler, Mercer, Lawrence, and Beaver Counties, and Operations in Allegheny County from the Lower End of Tarentum Borough north to the County Line and in Westmoreland County from a Point Opposite the Lower End of Tarentum Borough North along the Allegheny River to the Kiskiminitas River, and along the Kiskiminitas River Eastward to the Conemaugh River, and Continuing along the Conemaugh River to the County Line of Cambria County, Pennsylvania.

To all persons, firms, and corporations engaged in the mining and production of coal in the State of Pennsylvania:

The President of the United States having heretofore on or about the 21st day of August, 1917, by virtue of the provisions of an act of Congress known as the Food Law, ordered and directed that coal mined in the State of Pennsylvania should be sold at the prices named in said order, and applications having been thereafter made to the United States Fuel Administrator for a revision of such prices applicable to coal mined by certain companies in said State.

And the United States Fuel Administrator, after due consideration of said applications for revision of prices, having ordered and directed that, until further order in the premises, coal mined by O'Donnell Brothers, at Morris Run, Tioga County, in the State of Pennsylvania, should be sold at prices not to exceed, for run of mine, $2.25 per ton; prepared sizes, $2.50 per ton; and slack or screenings, $2.00 per ton; and by the Ajax Hocking Coal Company, in Allegheny

County, in the State of Pennsylvania at $2.75 per ton for run of mine only:

Now, the United States Fuel Administrator, after further consideration of the said prices applicable to coal mined in the State of Pennsylvania, and acting under authority of an Executive Order of the President of the United States dated 23 August, 1917, appointing said Administrator, and in furtherance of the purpose of said order and of the act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that, until further order in the premises, coal mined in operations in the Counties of Tioga, Lycoming, Clinton, Center, Huntingdon, Bedford, Cameron, Elk, Clearfield, Cambria, Blair, Somerset, Jefferson, Indiana, Clarion, Armstrong, Butler, Mercer, Lawrence and Beaver, and operations in Allegheny County from the lower end of Tarentum Borough north to the County line, and in Westmoreland County from a point opposite the lower end of Tarentum Borough north along the Allegheny River to the Kiskiminitas River, and along the Kiskiminitas River eastward to the Conemaugh River, and continuing along the Conemaugh River to the County line of Cambria County, may be sold, pending further investigation, at a price not to exceed $2.60 per ton for each of the grades of coal known as run of mine, prepared sizes, and slack or screenings, respectively.

This order annuls and supersedes all previous orders of the United States Fuel Administrator relating to the price of coal produced in the territory above described, and shall become effective at 7 a.m., February 16, 1918.

H. A. Garfield,
United States Fuel Administrator.

Washington, D. C., February 12, 1918.

EXHIBIT No 7.

Order of the United States Fuel Administrator of May 24, 1918, effective 7 a.m., May 25, 1918, Issued as Publication No. 26 of the United States Fuel Administration, Reducing Prices of Bituminous Coal at the Mine in all Producing Districts Ten Cents per Ton.

Washington, D. C., May 24, 1918.

The President of the United States, having heretofore by Executive Order, Dated 21 August, 1917, under authority of an act of Congress known as the "Food and Fuel Control Act" and approved August 10, 1917, fixed the prices for the sale of bituminous coal f. o. b. mines in the coal-producing districts set forth in said Executive Order and,

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator and of subsequent Executive Orders and in furtherance of said orders and of said act of Congress approved August 10, 1917, having after due consideration from time to time revised some or all of the prices fixed in said Executive Order of the President, dated 21 August, 1917, and having also fixed the prices for bituminous coal f. o. b. mines in certain coal-producing districts for which prices were not fixed in said last mentioned Executive Order.

The United States Fuel Administrator, acting under authority of said Executive Order of the President, dated 23rd August, 1917, appointing said Administrator and of subsequent Executive Orders and in furtherance of said orders and of the act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that all prices for bituminous coal f. o.b. mines in the coal-producing dis-

tricts throughout the United States fixed by the said Executive Order of the President, dated 21 August, 1917, and subsequent orders of the United States Fuel Administrator and in effect at 7 a.m., on the 25th day of May, 1918, shall be and the same hereby are reduced as to all shipments made after 7 a.m. on the 25th day of May, 1918, by the sum of ten cents for each net ton of 2,000 pounds.

This order shall in no way affect the increase contained in the Executive Order of the President, dated 27 October, 1917, adding the sum for forty-five cents to the price fixed for bituminous coal under the terms and provisions set forth in said last mentioned order.

H. A. Garfield,
United States Fuel Administrator.

EXHIBIT No. 8.

Order of the United States Fuel Administrator of January 17, 1919, Effective January 18, 1919, Vacating the Order of December 24, 1917, and Establishing a Regulation Relative to the Making of Contracts for the Sale of Coal or Coke by Operators, Producers, Jobbers, Sales Agents, or Purchasing Agents of Coal or Coke.

Washington, D. C., January 17, 1919.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said Orders and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that that portion of the order of said Administrator dated December 24, 1917, entitled "ORDER OF THE UNITED STATES FUEL ADMINISTRATOR REGULATING THE MAKING OF CONTRACTS BY OPERATORS, PRODUCERS, AND JOBBERS OF COAL AND COKE," issued as Publication No. 16 of the United States Fuel Administration, not heretofore vacated, be, and the same hereby is, vacated and set aside, as of the effective date of the regulation hereinafter established, and said Administrator

Hereby makes and establishes the following regulation effective January 18, 1919.

Regulation relative to the Making of Contracts for the sale of Coal or Coke by Operators, Producers, Jobbers, Sales Agents, or Purchasing Agents of Coal or Coke.

(1) Every contract for the sale of coal or coke made by an operator, producer, jobber, sales agent, or purchasing agent of coal or coke shall provide that the price of each shipment of coal or coke made thereunder shall not exceed the price at the mine or the place of production, as established by the President or by the United States Fuel Administrator, for the particular coal or coke to be shipped, and in effect at the date of shipment; provided, however, that every such contract made by a jobber, sales agent, or purchasing agent may provide for the addition to the price aforesaid of a margin or commission which shall not exceed on any shipment the permissible margin or commission allowed, at the date of such shipment, to said jobber, sales agent, or purchasing agent under the orders of the President of the United States Fuel Administrator then in force.

(2) Every such contract shall provide that the

same shall be forthwith canceled and of no further binding effect upon either party thereto, upon receipt of a request or an order from the United States Fuel Administrator for such cancellation, and that in case of such cancellation neither party to the contract shall be under any further liability to the other thereunder and that neither shall have any claim against the United States by reason of such contract or the cancellation thereof.

(3) Every such contract shall provide that coal or coke deliverable thereunder shall be subject to requisition by the United States Fuel Administrator or his representatives, including under the term "requisition" the right to divert such coal or coke to any other party than the purchaser named in the contract; that such requisition may be made at any time during the continuance of the contract and prior to actual receipt and unloading of the coal or coke so requisitioned, at the point of ultimate destination by the person entitled thereto under the terms of the contract; that such requisition shall be made at the going Government price in effect at the date of shipment, for the particular shipment of coal or coke so requisitioned, or, if on the date of such shipment there is no going Government price for the coal or coke so requisitioned, then at the price at which such shipment has been consigned by the shipper thereof, and without other or further liability of the Government or the requisitionee to either party to the contract than the payment of the price determined as hereinbefore in this paragraph provided, and transportation and other like charges paid or accrued.

(4) All contracts for the sale of coal or coke are subject to cancellation and termination at any time

by the President or by the United States Fuel Administrator.

H. A. Garfield,
United States Fuel Administrator,
By Cyrus Garnsey, Jr.,
Assistant United States Fuel Administrator.

EXHIBIT No. 9.

Order of the United States Fuel Administrator of January 21, 1919, Cancelling all outstanding Requisitions for Coal or Coke, as of January 31, 1919.

Washington, D. C., January 21, 1919.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said orders and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that all orders for the requisition of coal or coke heretofore issued by the United States Fuel Administrator or by his representatives and now outstanding, be, and each of said requisitions hereby is, canceled and annulled as of January 31, 1919.

H. A. Garfield,
United States Fuel Administrator.

EXHIBIT No. 10.

Order of the United States Fuel Administrator of January 31, 1919, Suspending, with the Exception of Regulations Mentioned therein, all Rules, Regu-

lations, Orders, and Proclamations Issued or Promulgated by or under Authority of the President or of the United States Fuel Administrator.

Washington, D. C., January 31, 1919.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said orders and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs:

Section I. That all rules, regulations, orders, or proclamations, except those enumerated in Section II of this order, heretofore issued or promulgated by, or under authority of, the President of the United States, or by, or under authority of, said United States Fuel Administrator, fixing the prices of coal, coke, charcoal, or wood, or regulating the production, sale, shipment, distribution, apportionment, storage, or use thereof, or requiring the obtaining of licenses to engage in or carry on the business of distributing coal or coke, or establishing rules and regulations in respect to the holders of such licenses, or otherwise carrying out the purposes or provisions of the Act of Congress herein above referred to, and the operation and effect of such rules, regulations, orders, or proclamations, be, and the same hereby are, suspended until further or other order or orders in the premises by the President of the United States, said United States Fuel Administrator, or other agency created by the President under said Act, in respect to all coal, coke, charcoal, or wood produced, sold, shipped, distributed, apportioned, stored, or used after January 31, 1919.

Section II. That the following rules, regulations,

orders and proclamations shall continue in full force and effect until further order or orders in the premises:

(1) Order of said United States Fuel Administrator, dated January 17, 1919, establishing a regulation entitled "Regulation relative to the making of contracts for the sale of coal or coke by operators, producers, jobbers, sales agents, or purchasing agents of coal or coke".

(2) Order of said United States Fuel Administrator, dated November 6, 1917, entitled "Order relative to tide-water trans-shipment of coal at Hampton Roads, Baltimore, Philadelphia, and New York and for the employment and co-operation with the Tidewater Coal Exchange so called, as a common agency to facilitate trans-shipment and to reduce delays in the use of coal cars and coal-carrying vessels".

(3) All rules, regulations, orders, or proclamations, in so far as such rules, regulations, orders or proclamations confer upon or delegate to said United States Fuel Administrator either individually or acting through that governmental organization called the United States Fuel Administration, any powers or authority for the carrying out of the purpose of the Act of Congress hereinabove referred to.

(4) Order of said United States Fuel Administrator, dated January 31, 1919, prohibiting the shipment of coal for reconsignment.

Section III. That no order or regulation relative to the prices of coal, coke, charcoal, or wood, or relative to the profits, margins, or commissions on sales thereof, or relative to the production, sale, shipment, distribution, apportionment, storage, or use thereof, shall be made after the date of this order by the Federal Fuel Administrator for any State, or any Local Fuel

Administrator or Committee, pursuant to authority heretofore delegated or conferred, unless and until such proposed order or regulation shall have first been submitted to and approved by said United States Fuel Administrator.

Section IV. That nothing in this order contained shall be construed to cancel or revoke the designation or appointment of any person as an officer, agent, representative, counsel, assistant, or subordinate of said United States Fuel Administrator or of the United States Fuel Administration.

H. A. Garfield,
United States Fuel Administrator.

Approved:
Woodrow Wilson.

EXHIBIT No. 11.

Order of the United States Fuel Administrator of February 20, 1919, Suspending from and after February 28, 1919, the Order of said Administrator of November 6, 1917, relative to Tidewater Trans-shipment of Coal, and the Order of January 31, 1919, Prohibiting the Shipment of Coal for Reconsignment.

Washington, D. C., February 20, 1919.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said orders and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby orders and directs that the Order of said Administrator, dated November 6, 1917, entitled

"Order relative to tidewater trans-shipment of coal at Hampton Roads, Baltimore, Philadelphia, and New York, and for the employment of and cooperation with the Tidewater Coal Exchange as a common agency to facilitate trans-shipment and to reduce delays in the use of coal cars and coal-carrying vessels", and the order of said Administrator dated January 31, 1919, prohibiting the shipment of coal for reconsignment, be, and each of said orders and the operation and effect thereof, is hereby suspended until other or further order in the premises by the President of the United States, the United States Fuel Administrator, or other agency created by the President under said Act, in respect to all coal sold, shipped, or distributed after February 28, 1919.

H. A. Garfield,
United States Fuel Administrator.

EXHIBIT No. 12.

EXECUTIVE ORDER.

Whereas, the United States Fuel Administrator acting under the authority of an Executive Order issued by me dated the 23rd day of August, 1917, appointing the said Fuel Administrator and [illegible] subsequent Executive Orders, and in furtherance of the purpose of said orders and of the Act of Congress therein referred to, and approved August 10, 1917, did, on January 31, 1919, and on February 20, 1919, execute and issue orders suspending, until further order by the president certain rules, regulations, orders and proclamations theretofore promulgated relating to the fixing of prices, the production, sale, shipment, distribution, apportionment, storage and use of coal, and whereas it is necessary to

restore and maintain during the war certain of said rules, regulations, orders and proclamations:

Now, Therefore, I, Woodrow Wilson, President of the United States of America, acting under authority of the aforesaid Act of Congress, approved August 10, 1917, do hereby revoke and annul said orders of January 31, 1919, and February 20, 1919, to the extent necessary to restore all of the said rules, regulations, orders and proclamations therein suspended concerning:

(a) Fixing prices of bituminous and lignite coal at the mines;

(b) Fixing or regulating commissions of persons and agencies performing the functions of middlemen dealing in bituminous and lignite coal;

(c) Fixing or regulating gross margins or prices of wholesale and retail dealers in bituminous and lignite coal; and do hereby restore all of said rules, regulations and proclamations, to the extent herein provided, to full force and effect, as if they had not been suspended.

Inasmuch as it is contemplated that it may be necessary from time to time to revoke other portions of said orders of January 31, 1919, and February 20, 1919, and to restore to full force and effect rules, regulations, orders and proclamations, or portions thereof, regulating the production, sale, shipment, distribution, apportionment, storage or use of bituminous and lignite coal, the Fuel Administrator shall, as occasion arises, restore, change or make such rules or regulations relating to the production, sale, shipment, distribution, apportionment, storage or use of bituminous and lignite coal as in his judgment may be necessary.

Woodrow Wilson.

The White House, October 30, 1919.

EXHIBIT No. 13.

Washington, D. C., October 31, 1919.

Acting under authority conferred upon me by the President of the United States under and by virtue of authority conferred upon him by the Act of Congress approved August 10th, 1917, I hereby revoke the order of the United States Fuel Administrator issued January 31, 1919, in so far as it suspended the order of the United States Fuel Administrator of January 14, 1918, effective seven o'clock a.m., January 15, 1918, and the portion of the order of the United States Fuel Administrator of May 25, 1918, setting up Preference lists, and I hereby restore the said order of January 14, 1918, and said portion of the order of May 25, 1918, to like effect as if they had not been suspended; and I designate the Director General of Railroads and his representatives to carry into effect the said order of January 14, 1918, and to make such diversions of coal which the railroads under his direction may as common carriers have in their possession, as may be necessary in the present emergency to provide for the requirements of the country in the order of priority set out in the preference list included in the order of the United States Fuel Administrator of May 25, 1918, as follows:

(a) Railroads,

(b) Army and Navy, together with other Departments of the Federal Government,

(c) State and County Departments and Institutions,

(d) Public Utilities,

(e) Retail Dealers,

(f) Manufacturing Plants on War Industries Board's Preference List,

(g) Manufacturing Plants not on War Industries Board's Preference List,

(h) Jobbers,
(i) Lake,
(j) Tidewater.
This order to be effective at once.

H. A. Garfield,
United States Fuel Administrator.

EXHIBIT No. 14.

EXECUTIVE ORDER.

WHEREAS, the United States Fuel Administrator acting under the authority of an Executive Order issued by me dated August 23, 1917, appointing the said United States Fuel Administrator, and all subsequent Executive Orders, and in furtherance of the purpose of said orders and of the Act of Congress therein referred to, and approved August 10, 1917, did on January 31, 1919, and on February 20, 1919, execute and issue orders suspending until further order by the President certain rules, regulations, orders and proclamations theretofore promulgated, relating to the fixing of prices, the production, sale, shipment, distribution, apportionment, storage and use of coal and coke; and whereas, by an Executive Order dated October 30, 1919, the said orders of January 31, 1919, and of February 20, 1919, were revoked and annulled to the extent set forth in the said Executive Order of October 30, 1919; and whereas it appears that it may become necessary to restore and maintain during the war certain other of said rules, regulations, orders and proclamations.

NOW, THEREFORE, I, Woodrow Wilson, President of the United States of America, acting under authority of the aforesaid Act of Congress, approved August

10, 1917, do hereby order and direct that the United States Fuel Administrator shall, as occasion may require, restore, change or make such rules, regulations, orders and proclamations fixing the prices or regulating the production, sale, shipment, distribution, apportionment, storage or use, of all coal or coke as in his judgment may be necessary.

Woodrow Wilson.

The White House, November 5, 1919.

EXHIBIT No. 15.

Washington, D. C., November 12, 1919.

The United States Fuel Administrator, acting under authority of an Executive Order of the President of the United States, dated 23 August, 1917, appointing said Administrator, and of subsequent Executive Orders, and in furtherance of the purpose of said Order and of the Act of Congress therein referred to and approved August 10, 1917,

Hereby Orders and Directs that the Executive Order dated October 30, 1919, restoring certain rules, regulations, orders and proclamations relative to prices of bituminous coal and lignite, and the margins and profits of middlemen and wholesale and retail dealers in bituminous coal and lignite, shall not be applicable to bituminous coal shipped on or after November 13, 1919, under a bona fide contract enforceable at law, entered into prior to October 30, 1919, and coal shipped under any such contract and diverted in transit, shall be paid for by the party receiving the same, at the price at which the shipper would be entitled to bill the same to the original consignee thereof.

The regulation of said Administrator dated Janu-

ary 17, 1919, entitled "Regulation relative to the Making of Contracts for the Sale of Coal or Coke by Operators, Jobbers, Sales Agents or Purchasing Agents of Coal or Coke", and the order of said Administrator dated January 14, 1918, relative to the price to be paid for coal by the divertee in case of diversion, as amended by the order of said administrator dated November 20, 1918, and each of them is, hereby suspended in so far as said regulation and order, or either of them, are inconsistent with this order.

H. A. Garfield,
United States Fuel Administrator,
By Cyrus Garnsey, Jr.,
Assistant United States Fuel Administrator.

EXHIBIT No. 16.

EXECUTIVE ORDER.

Pursuant to the authority vested in me by the Act of Congress of August 10, 1917, entitled "An Act to Provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and other powers thereunto me authorizing, I, Woodrow Wilson, President of the United States of America, do hereby order and direct that from and after 12.01 o'clock a.m. on the first day of April, 1920, the order issued by me on the 30th day of October, 1919, restoring certain rules, regulations, orders and proclamations therein referred to, relative to the price of bituminous coal and other matters and things therein described, shall be suspended until further ordered, and that all other Executive Orders subsequent thereto issued by me, except the executive Order of February

25, 1920, relative to the Tidewater Coal Exchange, and all orders subsequent thereto issued by the United States Fuel Administrator, or any person acting pursuant to authority conferred upon him either by me or the United States Fuel Administrator, shall be suspended, until otherwise ordered, on and after 12.01 o'clock a. m., April 1, 1920, it being the intent and purpose of this order to restore at 12.01 o'clock a.m., on April 1, 1920, the rules and regulations of the United States Fuel Administration to the status existing immediately prior to the aforesaid Executive Order of October 30, 1919, but not in any wise to affect the validity of any act or thing done under any of said orders or regulations prior to 12.01 o'clock a.m., April 1, 1920, or the Executive Order of February 25, 1920, relative to the Tidewater Coal Exchange.

Woodrow Wilson.

The White House, 19 March, 1920.

X. FINDINGS AND CONCLUSIONS OF THE TRIAL JUDGE.

GEORGE B. NEWTON COAL CO.
vs.
JAMES C. DAVIS, Director General of Railroads as Agent of the President operating the Philadelphia & Reading Railway.

C. P. No. 4.
June Term, 1921.
No. 1367.

FINLETTER, *J.*, June 21, 1923:

By agreement of the parties a jury trial was dispensed with.

DISCUSSION.

The plaintiff sues to recover the value of a quant-

ity of coal, its property, which was taken and used by the defendant, under the following circumstances:

It had been delivered to the plaintiff and was in transit over the defendants' lines from the point where plaintiff had bought it to it at Philadelphia.

It was seized by the United States Fuel Administrator and delivered to the defendant for use upon the Philadelphia and Reading Railroad Company, then operated by the United States Government under the Federal Control Act, and payment was made to plaintiff at a rate fixed by the Fuel Administrator. This rate the plaintiff claims and has proved was much less than the current market price. Plaintiff sues for the difference.

The sequence of events leading to the above recited acts is this:

In 1917, when war was declared, Congress by statute conferred upon the President certain legislative and other powers to be exercised by him for the "efficient prosecution of the war". (The Food and Fuel Control Act of August 10, 1917. See Section 25.) Among the powers granted was that of regulating the price of fuel and making such seizures of it as were in his judgment necessary for the purpose of the grant of power.

To carry out the powers or duty in question an agency was created called the Fuel Administrator, which was in turn duly empowered by the President to put into effect measures determined upon by him. During the active conduct of the war this Department issued and enforced many orders designed to promote the objects to the accomplishment of which Congress had clothed the President with the powers referred to—that is "the efficient conduct of the war".

Shortly after the Armistice but before the formal

promulgation of peace between the United States and Germany (on January 17, 1919) the President suspended substantially all orders relating to the control of fuel. The Fuel Administrator ceased in fact to function.

Matters so remained until the Autumn of 1919 when a Nation wide coal strike was threatened, to be put into effect on November 1st, 1919.

The President thereupon issued an Executive Order, recited to be done under the Act of Congress first referred to above, recalling the suspension of the Fuel Orders that had been in effect during the war and directing the Fuel Administrator to make such rules and regulations as might in his judgment be necessary in the premises. The Fuel Administrator in obedience to the President's executive order issued a general order under which the plaintiff's coal was seized, and, under the Overman Act, which authorized the transfer of functions from one agency to another, he authorized the Director General of Railroads to carry out the order. The Director General, Mr. Davis. who is the defendant in this case, acting as the agent of the Fuel Administrator seized the coal and delivered it to the Director General of Railroads, Agent of the President, operating the Philadelphia & Reading Railway, who used it in the operation of his department.

"The fixing of prices is certainly a legislative power" and the Act of August 10, 1917, is a case of "delegated legislative power * * * It is a power conferred in derogation of the general rule that legislative power cannot be delegated. If it is to be sustained at all, therefore, it must be sustained with close adherence to the limitations with which Congress surrounds its exercise. Such delegations are permissible where in the nature of things it is impossible for Con-

gress itself to resort to the detail essential to its proper exercise * * * To render such delegation proper, the legislature must in general terms indicate the general lines of policy in accord with which the power is to be essential * * * Considering that this is the delegation of legislative power its limitations are to be strictly contrued." (The quotations are from an opinion of Mr. Taft given as counsel before his induction into the office of Chief Justice. He also points out the "marked distinction in the generality of the purposes" to be subserved by action of the President under Section 25, which conferred powers with respect to regulation of prices of coal, and Sections 5, 12, 14, and 15 relating to powers over other subjects).

Omitting any discussion of those sections of the Act of August 10, 1917, which require certain preliminary inquiries as a foundation for presidential action, and also the question whether or not there is a presumption that these requirements had been complied with, neither of which subjects need, in the view we have taken of the case, be considered, it will be assumed that no question can be made of the legality of the President's act in making the original executive orders, suspending their operation, or even in reinstating them. In form they all purport to be issued under the Act of Congress which conferred the power upon the President, and they are recited as intended to be effective "during the war".

Nor has any question been made of the application of the statute to the period between the termination of active war and the formal proclamation of peace, and it has been assumed that a state of war existed, so far as the power of the President to reinstate the fuel orders is concerned. In other words

it will not be denied that the President was within his powers in issuing the executive order if he did it expressly as a war measure. And we think that if he did nothing more than refer to the statute as the authority for his order, and was silent as to his motives or purposes, (which was in fact the form of his action) it must nevertheless be assumed that his action was taken to further the purposes of the statute—to wit, the efficient conduct of the war.

The Fuel Administrator was then, we think, fully authorized to issue any order which in his judgment was necessary to promote the efficient conduct of the war. On the other hand he had no grant of authority to issue orders to accomplish other ends. Fortunately or unfortunately he, unlike the President, expressed the reasons for his issuance of the order under which the plaintiff's coal was seized. He said his order was issued "in the present emergency".

The phrase is in itself indefinite without the consideration of testimony which would ascertain what was the "present emergency" to which the Administrator referred. Testimony was offered and is undisputed, indeed it came from a witness for the defendant, one of the agents of the Fuel Administrator, that the emergency which called forth the order was a general strike in the coal mining industry. It is historically true that the World War was at an end, the Armistice signed and the American Army demobilized. Thus both affirmatively and by negative inference it is established that a domestic strike and not a foreign war, nor a war of any kind, was the emergency and the difficulty sought to be remedied by the Fuel Administrator's order.

"If Congress intended, as the words necessary for the efficient prosecution of the war indicate" that

the powers were to be exercised for war purposes then they "cannot be extended to meet emergencies not related to the war".

The Fuel Administrator's order was therefore in excess of the directions given him by the President's executive order, and the seizure of plaintiff's coal was illegal and in excess of the powers granted by Congress.

It is objected by defendant that even if this is so it gives no other remedy to the injured plaintiff than a personal action against the agent for his tortious act. Undoubtedly both Mr. Garfield and his agent Mr. Davis would be liable to such a suit if they exceeded their lawful authority. But this does not exclude a right of action against a third party who by a use of plaintiff's coal has made himself liable on a quantum meruit for the value of the plaintiff's property consumed. And it is admitted that after the Fuel Administrator and his agent, Mr. Davis, had seized the coal it was used and consumed by the government in the operation of one of its railroads.

Hamilton vs. Kentucky Distilleries Company, 251 U. S. 146, and Ford vs. U. S., 281 Fed. 298, cited by defendant have no bearing upon the present case, because neither the Executive Order of the President nor the constitutionality of the Lever Act, is in our view of the case, attacked by the plaintiff.

Neither can the doctrine of estoppel operate against the plaintiff because of his compliance with the order of the Fuel Commissioner in other cases, not involved in the transaction in suit. To work an estoppel the acts relied upon must be connected with the claim in suit. In Vogelstein vs. U. S., decided May 21, 1923, the claimant had cooperated with the government in fixing the price he complained of.

The plaintiff in addition argues that even granting the legality of the Fuel Administrator's order the present suit is properly brought because the seizure of the coal was for the use and benefit of the government itself. "All the coal involved in this case * * * was consumed as fuel necessary for the operations of said railroads". Paragraph 24. Agreement of facts. It is therefore plaintiff argues within the operation of the 5th Amendment to the constitution of the United States which provides that "just compensation" shall be made by the government for goods seized for its own use. National City Bank vs. U. S., 275 Fed. 855, affirmed 281 Fed. 754. (See also Section 10 of the Act of August 10, 1917.)

If this coal had been seized for the use of the Army or Navy there can be no doubt that the United States would be bound to make "just compensation". Nor can we see any difference between its operation of the Navy and its operation of the railroads under the "Federal Control Act". In either case it is an activity of the Government. The dominion over and control of the railroads was complete, and the plaintiff's coal was as completely used by the government in the firebox of the defendant's locomotive as it would have been under the boilers of a war ship.

The defendant however insists that the suit should then have been brought against the United States, eo nomine, and not against the Director General of Railroads. And so it should, if Congress had not otherwise directed by Act of February 28th, 1920 C 91 Title 11, G 206, Barnes' Federal Code (Suppt. 1922) page 610, which provides that: "Actions at law * * * based on causes of action arising out of the * * * operations by the President of the railroad * * * of any carrier (Under the provisions of the Federal Control Act

* * *) of such character as prior to Federal Control could have been brought against such carrier, may, after the termination of Federal Control, be brought against an agent designated by the President for such purpose."

In the absence of this statute the government operating the railroads would be responsible for fuel acquired either by contracts or otherwise and would be properly named as a defendant in a suit by the owner of the coal. The effect of the statute is to create an official defendant as a substitute for the government itself for all actions connected with the governmental operation of the railroads. Two ends are served by this, the dignity of the King is observed, and accounting at end of Federal Control made easier.

But, whatever the reason, the effect of the statute is that, for all suits against the United States arising out of its operation of railroads, a defendant was named against whom suits were to be brought.

We believe the plaintiff was right in following the statute in the case at bar.

On either theory the defendant is entitled to judgment for damages measured in effect by the same standard, the difference between the price paid and the market value of the goods at the date of conversion.

C. M. & St. P. Rwy. vs. McCall Co., 253 U. S. 97.

National City Bank vs. U. S., 275 Fed. 855. Affirmed 281 Fed. 754.

C. G. Blake Co. vs. U. S., 275 Fed. 861, affirmed 279 Fed. 71.

U. S. v. New River Collieries Co., 276 Fed. 690.

In the consideration of the market price the arbitrary and artificial standard fixed by the government plays no part.

XI. PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND ANSWERS THERETO.

1. The plaintiff, George B. Newton Coal Company, is engaged in the business of buying anthracite and bituminous coal and selling it in the City of Philadelphia. The greater part of its business is selling at retail coal received by railroad at its various yards and delivered by truck at the home or factory of the consumer.

Affirmed.

2. The defendant, James C. Davis, Director General of Railroads as Agent of the President, is an officer of the United States designated by the President pursuant to the provisions of Section 206 of the Transportation Act—1920—as the person against whom actions should be brought arising out of the possession, use or operation by the President of the Pennsylvania Railroad and the Philadelphia & Reading Railway during the period of Federal control, viz., from December 27, 1917, to February 29, 1920, inclusive. During the period of Federal control, the President operated the Pennsylvania Railroad and the Philadelphia & Reading Railway under the provisions of the Federal Control Act of March 21, 1918, and of the Act of August 29, 1916.

Affirmed.

3. The plaintiff buys its coal on annual contracts, written or oral, with various coal mining companies. These contracts provide that the seller shall sell to the plaintiff specified amounts of coal f. o. b. the mines. The plaintiff was to receive the coal at the mines and under the contracts title passed to it at the mines.

Affirmed.

4. Among other contracts, the plaintiff had contracts with various coal mining companies calling for the delivery of bituminous coal during the months of January and February, 1920, at various prices ranging from $2.95 to $3.78 per net ton f. o. b. mines.

Affirmed.

5. The coal called for by these contracts was high grade low volatile coal, most of it being known as "Pool 1" coal, one of the highest grades of coal on the market.

Affirmed.

6. During the months of January and February, 1920, there were shipped to the plaintiff on these contracts over the line of the Pennsylvania Railroad 80 cars of coal aggregating 9,155,100 pounds or 4.577.55 net tons (2,000 pounds each), and over the line of the Philadelphia & Reading Railway 33 cars of coal aggregating 3,779,300 pounds or 1,889.65 tons.

Affirmed.

7. The total cost to the plaintiff (including price payable by the plaintiff under its contract, the freight charges and the war tax) of the 80 cars shipped over the Pennsylvania Railroad was $22875.22, an average of approximately $5.00 per net ton, and the total cost of the 33 cars shipped over the Philadelphia & Reading Railway was $9,411.62, an average of approximately $4.98 per net ton.

Affirmed.

8. The details of these shipments, that is, the date of shipment, car number, the name of the shipper, the destination, the weight, the cost of the coal, the freight and the total delivered cost is stated in the appendixes

attached hereto, marked Appendix "B" and Appendix "C".

Affirmed.

9. After the coal had been shipped and while it was on the lines of the Pennsylvania Railroad and the Philadelphia & Reading Railway, it was seized by the defendant and used by him as fuel for the operation of the said railways.

Affirmed. But I would say it was "seized by the defendant as agent of the Fuel Administrator and used by the defendant as agent of the Government in charge of the operation of railroads".

10. The defendant has paid to the said shippers of the coal the full amount called for by the contracts between the said shippers and the plaintiff.

Affirmed.

11. Each of the cars was seized by the defendant in accordance with the so called "Confiscation Notices", i. e., orders from the Director General of Railroads that the coal be diverted from the plaintiff to the railroad for fuel supply.

Affirmed with the same reference to his agency as in answer No. 9.

12. The orders were issued by the Director General of Railroads in pursuance of the following orders (set forth in full in Appendixes "D" to "G", inclusive):

(a) An order of the President of the United States dated October 30, 1919, revoking and annulling part of the order of January 31, 1919, and restoring the war time price fixing regulations which had been suspended

by that order. The war time regulations were made in accordance with the Act approved August 10, 1917, commonly known as the "Lever Law".

(b) An order of H. A. Garfield, United States Fuel Administrator, dated October 31, 1919, revoking and annulling that part of the Order of January 31, 1919, which suspended the coal diversion regulations and designating the Director General of Railroads and his representatives to carry into effect these regulations.

Affirmed.

13. The orders of October 30, and October 31 were issued to meet the emergency caused by the nation wide coal strike called to begin November 1, 1919.

Affirmed.

14. By order of the President of the United States, dated March 19, 1920, and effective April 1, 1920, the above orders of October 30 and 31, and all other regulations concerning the Fuel Administration were revoked.

Affirmed.

15. The confiscation by the defendant of the 113 cars consigned to the plaintiff caused a very serious shortage in the plaintiff's coal supply. Plaintiff, upon receipt of the notices of confiscation, went into the open market and bought spot coal (i. e. coal actually in Philadelphia) to an amount greater than the quantity confiscated by the defendant. The coal it bought was of a grade lower than that confiscated by the defendant. The plaintiff bought at the lowest price obtainable.

Affirmed with the change that the confiscation was

by the Fuel Administrator and the use of the coal by the Railroad Administration.

16. The price of the cheapest 6,467,20 tons (i. e., the amount confiscated by the defendant) which the plaintiff purchased on the open market was $6.44 per net ton delivered in Philadelphia, that is $29,479.42 for the amount of coal confiscated by the defendant on the Pennsylvania Railroad, and $12,169.35 for the coal confiscated on the Philadelphia & Reading Railway.

Affirmed.

17. At the time this coal was taken by the defendant, the coal market at Philadelphia and all over the country was in a choatic condition, as is explained more in detail hereinafter.

Affirmed.

18. There was what was known as the Government price, i. e., the price fixed by the regulations hereinbefore mentioned. This price for coal of the kind seized by the defendant (when not covered by bona fide contracts entered into before October 30, 1919) was $2.95 f. o. b. mines, which is the equivalent (with the addition of freight charges and war tax thereon) to $4.97 per net ton at Philadelphia. The regulations permitted that coal covered by bona fide contracts entered into before October 30, 1919, should be sold at the price named in such contracts and this price was in many cases higher than $2.95.

Affirmed.

19. Coal was being sold and delivered on contract at the Government price at the time this coal was seized, but it was impossible to buy coal not covered by contract at such a price. The only coal to be bought in

the open market was for sale only at prices greatly in excess of the Government price.

Affirmed.

20. The market price of coal, that is the price at which coal was actually sold by sellers to buyers who did not have long term contracts for the coal, rapidly rose after the beginning of 1919. In the spring of 1919 it rose from $6 to $8 per net ton at the mines and in the early fall it sold as high as $12.50 or $15 per net ton.

Affirmed.

21. At the time this coal was seized by the defendant and at the time it should have been delivered to the plaintiff in the normal course of transportation, the market price at Philadelphia was $6.44 per net ton for coal of a grade inferior to that taken by the defendant. It was impossible at any price at that time to get coal in Philadelphia of the grade seized by the defendant.

Affirmed.

22. The plaintiff was damaged by the defendant's action in seizing the coal in the amount of the difference between the cost of the coal seized by the defendant and its value at $6.44 per net ton, plus interest thereon from March 1, 1920, to the date of judgment. This amounted to $6,604.20, plus interest in the case of the coal seized on the Pennsylvania Railroad, and $2,757.73 plus interest in the case of the coal seized on the Philadelphia & Reading Railway.

Affirmed.

XII. PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW AND ANSWERS THERETO.

1. The 80 cars of coal shipped to the plaintiff and seized on the Pennsylvania Railroad and the 33 cars of coal shipped to the plaintiff and seized on the Philadelphia & Reading Railway were the property of the plaintiff at the time they were seized.

Affirmed.

2. The seizure of the coal was an unlawful conversion.

Affirmed.

3. The plaintiff is entitled to recover as damages the market value of the coal at the time and at the place when it should have been delivered to the plaintiff minus freight charges and war tax and the amount which the defendant has paid to the shippers of the coal.

Affirmed.

4. In determining the market value of the coal seized by the Director General of Railroads, the Court cannot take into consideration the prices fixed or the other regulations issued by the Director General himself.

Affirmed.

5. The plaintiff is entitled to recover from the defendant the amount it had to pay to replace the coal seized by the defendant minus the amounts which it would have had to pay as contract purchase price, freight charges and war tax on the coal seized.

Affirmed.

6. The seizure of the coal was unwarranted be-

cause the order of H. A. Garfield, United States Fuel Administrator, dated October 31, 1919, delegating his powers to the Director General of Railroads was beyond his authority.

Refused.

7. The seizure of the coal was unwarranted because the order of the President, dated October 30, 1919, was beyond the authority given to him by the Lever Law.

Refused.

8. The Lever Law does not authorize the President to divert coal or regulate the price of coal for the purpose of answering the threat of the coal strike or of meeting any other domestic emergency.

Affirmed.

9. If the Lever Law authorized the Director General of Railroads to seize the plaintiff's coal in February, 1920, without paying for it its full market value, it was unconstitutional.

Refused because argumentative.

10. The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit.

Affirmed.

11. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Pennsylvania Railroad, in the sum of $6,604.20 with interest from March 1, 1920, to the date of judgment at 6% per annum.

Affirmed.

12. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Philadelphia & Reading Railway, in the sum of $2,757.73 with interest from March 1, 1920, to the date of judgment of 6% per annum.

Affirmed.

XIII. DEFENDANTS' REQUESTS FOR FINDINGS OF FACT AND ANSWERS THERETO.

1. Plaintiff's contracts to supply coal to its customers provided that they were subject to legislation affecting the cost of production and delivery.

Affirmed.

2. Under plaintiff's oral contract with The Berwind White Coal Mining Company, the latter only agreed to ship to plaintiff as much coal as it could, so plaintiff was not in a position to rely on the Berwind White Coal Mining Company as the source of its supply of coal.

Refused. This is immaterial since the coal in suit was actually delivered.

3. Plaintiff's contract for the purchase of coal from Madeira Hill & Co., which was made prior to February, 1920, contained the following provision:

> "It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administrator, dated December 24th, 1917, and effective December 29th, 1917, all of the terms and provisions of which are hereby incorporated

herein, with the same force and effect as if the same were set forth at length."

Refused. See answer to No. 2.

4. Plaintiff's contract for the purchase of coal from Whitney & Kemmerer contained a provision that the contract was subject to any rules and regulations which might be made by the United States Fuel Administration.

Affirmed. The contract contained such a clause, but the only regulation referred to by the defendant was that of July 17, 1919, which applied to "coal deliverable" under a contract, provided for "requisition prior to actual receipt". This regulation had no application to the coal in suit which was *delivered* to plaintiff f. o. b. mines.

5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:

> "This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as if set forth at length."

Affirmed. See answer to No. 4.

6. Plaintiff's contract for the purchase of coal from Commercial Coal Mining Company contained the following provision:

"That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919."
Affirmed. See answer to No. 4.

7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months of 1920.
Refused as immaterial.

8. During the period from November 1st, 1919, to March, 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration, and coal was so diverted and settlement therefor was made by plaintiff with the shippers of such coal at the prices established by the United States Fuel Administration.
Refused as immaterial.

XIV. DEFENDANTS' REQUESTS FOR CONCLUSIONS OF LAW AND ANSWERS THERETO.

1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforceable during the period covered by this suit.
Refused.

2. Defendants have paid to the shippers the full amounts required by the regulations of the United States Fuel Administration for the coal diverted to them and involved in this suit.
Affirmed.

3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919, to March 1st, 1920, making requests for diversion of coal to it and settling therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the prices fixed by such regulations for coal consigned to it which was diverted to other parties.

Refused.

4. There is no liability on the part of the defendants named in these actions to plaintiff as plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276.

Refused.

5. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Pennsylvania Railroad, and judgment is therefore entered in favor of said defendant and against the said plaintiff.

Refused.

6. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Philadelphia and Reading Railway, and judgment is therefore entered in favor of said defendant and against the said plaintiff.

Refused.

XV. FINDINGS AND CONCLUSIONS OF THE TRIAL JUDGE.

GEORGE B. NEWTON COAL COMPANY
vs.
JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad.

C. P. No. 4.
June Term, 1921.
No. 1369.

FINLETTER, *J.* June 21, 1923:—

By agreement of the parties a jury trial was dispensed with.

DISCUSSION.

This case was heard jointly with a similar action against the Director General operating the Philadelphia and Reading Railway. A single hearing was held under an agreement that the testimony should apply to both cases. And counsel have followed this plan in submitting their requests for findings of fact and conclusions of law. The trial Judge has answered them in the form submitted, and now reiterates them in the case referred to in the caption, and in addition finds as fact:—

1. That the defendant on March 1, 1920, confiscated 80 cars of coal, aggregating 4,577.55 net tons, the property of the plaintiff.

2. The cost of said coal to the plaintiff at Philadelphia was $22,875.22 and the market value at the time it was converted by the defendant, to wit, March 1, 1920, was (delivered at Philadelphia), $6.44 a net ton or $29,479.42.

3. The defendant has paid the plaintiff the cost, i. e. $22,875.22.

The additional conclusion of law is also found:—

1. That in the facts found the defendant is liable to pay to the plaintiff the market value of the coal converted, i. e. $29,479.42 less the amount already paid, i. e. $22,875.22, with interest on the balance from March 1, 1920.

XVI. DEFENDANT'S EXCEPTIONS TO FINDINGS OF THE TRIAL JUDGE.

GEORGE B. NEWTON COAL CO.
vs.
JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Philadelphia & Reading Railway.

C. P. No. 4.
June Term, 1921.
No. 1367.

AND NOW, July 3rd, 1923, the above named defendant files the following Exceptions to the findings of the learned trial Judge in this case.

1. The learned trial Judge erred in affirming plaintiff's 13th request for finding of fact, which request and the answer thereto were as follows:—

> "13. The orders of October 30 and October 31 were issued to meet the emergency caused by the nation wide coal strike called to begin November 1, 1919."
>
> Answer: "Affirmed."

2. The learned trial Judge erred in affirming plaintiff's 19th request for finding of fact, which request and the answer thereto were as follows:—

> "19. Coal was being sold and delivered on contract at the Government price at the time this coal was seized, but it was impossible to buy coal

not covered by contract at such a price. The only coal to be bought in the open market was for sale only at prices greatly in excess of the Government price."

Answer: "Affirmed."

3. The learned trial Judge erred in affirming plaintiff's 20th request for finding of fact, which request and the answer thereto were as follows:—

"20. The market price of coal, that is the price at which coal was actually sold by sellers to buyers who did not have long term contracts for the coal, rapidly rose after the beginning of 1919. In the spring of 1919 it rose from $6 to $8 per net ton at the mines and in the early fall it sold as high as $12.50 or $15 per net ton."

Answer: "Affirmed."

4. The learned trial Judge erred in affirming plaintiff's 21st request for finding of fact, which request and the answer thereto were as follows:—

"21. At the time this coal was seized by the defendant and at the time it should have been delivered to the plaintiff in the normal course of transportation, the market price at Philadelphia was $6.44 per net ton for coal of a grade inferior to that taken by the defendant. It was impossible at any price at that time to get coal in Philadelphia of the grade seized by the defendant."

Answer: "Affirmed."

5. The learned trial Judge erred in affirming plaintiff's 22nd request for finding of fact, which request and the answer thereto were as follows:—

"22. The plaintiff was damaged by the defendant's action in seizing the coal in the amount of the difference between the cost of the coal seized by the defendant and its value at $6.44 per net ton.

plus interest thereon from March 1, 1920, to the date of judgment. This amounted to $6,604.20, plus interest in the case of the coal seized on the Pennsylvania Railroad, and $2,757.73 plus interest in the case of the coal seized on the Philadelphia & Reading Railway."

Answer: "Affirmed."

6. The learned trial Judge erred in affirming plaintiff's first request for conclusion of law, which request and the answer thereto were as follows:—

"1. The 80 cars of coal shipped to the plaintiff and seized on the Pennsylvania Railroad and the 33 cars of coal shipped to the plaintiff and seized on the Philadelphia & Reading Railway were the property of the plaintiff at the time they were seized."

Answer: "Affirmed."

7. The learned trial Judge erred in affirming plaintiff's second request for conclusion of law, which request and the answer thereto were as follows:—

"2. The seizure of the coal was an unlawful conversion."

Answer: "Affirmed."

8. The learned trial Judge erred in affirming plaintiff's third request for conclusion of law, which request and the answer thereto were as follows:—

"3. The plaintiff is entitled to recover as damages the market value of the coal at the time and at the place when it should have been delivered to the plaintiff minus freight charges and war tax and the amount which the defendant has paid to the shippers of the coal."

Answer: "Affirmed."

9. The learned trial Judge erred in affirming

plaintiff's fourth request for conclusion of law, which request and the answer thereto were as follows:—

> "4. In determining the market value of the coal seized by the Director General of Railroads, the Court cannot take into consideration the prices fixed or the other regulations issued by the Director General himself."
>
> Answer: "Affirmed."

10. The learned trial Judge erred in affirming plaintiff's fifth request for conclusion of law, which request and the answer thereto were as follows:—

> "5. The plaintiff is entitled to recover from the defendant the amount it had to pay to replace the coal seized by the defendant minus the amounts which it would have had to pay as contract purchase price, freight charges and war tax on the coal seized."
>
> Answer: "Affirmed."

11. The learned trial Judge erred in affirming plaintiff's tenth request for conclusion of law, which request and the answer thereto were as follows:—

> "10. The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit."
>
> Answer: "Affirmed."

12. The learned trial Judge erred in affirming plaintiff's twelfth request for conclusion of law, which request and the answer thereto were as follows:—

> "12. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Philadelphia & Reading Railway in

the sum of $2,757.73 with interest from March 1, 1920, to the date of judgment at 6% per annum."

Answer: "Affirmed."

13. The learned trial Judge erred in refusing to affirm defendant's 2nd request for finding of fact, which request and the answer thereto were as follows:

"2. Under plaintiff's oral contract with The Berwind White Coal Mining Company, the latter only agreed to ship to plaintiff as much coal as it could, so plaintiff was not in a position to rely on the Berwind White Coal Mining Company as the source of its supply of coal."

Answer: "Refused. This is immaterial, since the coal in suit was actually delivered."

14. The learned trial Judge erred in refusing to affirm defendant's 3rd request for finding of fact, which request and the answer thereto were as follows:—

"3. Plaintiff's contract for the purchase of coal from Madeira Hill & Co., which was made prior to February, 1920, contained the following provision:

'It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administrator, dated December 24th, 1917, and effective December 29th, 1917, all of the terms and provisions of which are hereby incorporated herein, with the same force and effect as if the same were set forth at length.'"

Answer: "Refused. See answer to No. 2."

15. The learned trial Judge erred in refusing to affirm without qualification defendant's 4th request for finding of fact, which request and the answer thereto were as follows:—

"4. Plaintiff's contract for the purchase of coal from Whitney & Kemmerer contained a provision that the contract was subject to any rules and regulations which might be made by the United States Fuel Administration."

Answer: "Affirmed. The contract contained such a clause, but the only regulation referred to by the defendant was that of July 17, 1919, which applied to 'coal deliverable' under a contract, provided for 'requisition prior to actual receipt.' This regulation had no application to the coal in suit which was delivered to plaintiff f. o. b. mines."

16. The learned trial Judge erred in refusing to affirm without qualification defendant's 5th request for finding of fact, which request and the answer thereto were as follows:—

"5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:

'This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as if set forth at length.'"

Answer: "Affirmed. See answer to No. 4."

17. The learned trial Judge erred in refusing to affirm without qualification defendant's 6th request for finding of fact, which request and the answer thereto were as follows:—

"6. Plaintiff's contract for the purchase of coal from Commercial Coal Mining Company contained the following provision:

'That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919.' "

Answer: "Affirmed. See answer to No. 4."

18. The learned trial Judge erred in refusing to affirm defendant's 7th request for finding of fact, which request and the answer thereto were as follows:—

"7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months in 1920."

Answer: "Refused as immaterial."

19. The learned trial Judge erred in refusing to affirm defendant's 8th request for finding of fact, which request and the answer thereto were as follows:—

"8. During the period from November 1st, 1919, to March, 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration and coal was so diverted and settlement therefor was made by plaintiff with the shippers of such coal at the prices established by the United States Fuel Administration."

Answer: "Refused as immaterial."

20. The learned trial Judge erred in refusing to affirm defendant's first request for conclusion of law, which request and the answer thereto were as follows:—

"1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforceable during the period covered by this suit."

Answer: "Refused."

21. The learned trial Judge erred in refusing to affirm defendant's third request for conclusion of law, which request and the answer thereto were as follows:—

> "3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919, to March 1st, 1920, making requests for diversion of coal to it and settling therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the price fixed by such regulations for coal consigned to it which was diverted to other parties."
>
> Answer: "Refused."

22. The learned trial Judge erred in refusing to affirm defendant's fourth request for conclusion of law, which request and the answer thereto were as follows:—

> "4. There is no liability on the part of the defendants named in these actions to plaintiff as plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276."
>
> Answer: "Refused."

23. The learned trial Judge erred in refusing to affirm defendant's sixth request for conclusion of law, which request and the answer thereto were as follows:—

> "6. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Philadelphia and Reading Railway, and judgment is therefore entered in

favor of said defendant and against the said plaintiff."

Answer: "Refused."

WILLIAM CLARKE MASON,
Attorney for Defendant.

XVII. DEFENDANTS' EXCEPTIONS TO FINDINGS OF THE TRIAL JUDGE.

GEORGE B. NEWTON COAL CO.
vs.
JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad.

C. P. No. 4.
June Term, 1921.
No. 1369.

AND NOW, July 3rd, 1923, the above named defendant files the following Exceptions to the findings of the learned trial Judge in this case.

1. The learned trial Judge erred in affirming plaintiff's 13th request for finding of fact, which request and the answer thereto were as follows:

"13. The orders of October 30, and October 31 were issued to meet the emergency caused by the nation wide coal strike called to begin November 1, 1919."

Answer: "Affirmed."

2. The learned trial Judge erred in affirming plaintiff's 19th request for finding of fact, which request and the answer thereto were as follows:

"19. Coal was being sold and delivered on contract at the Government price at the time this

coal was seized, but it was impossible to buy coal not covered by contract at such a price. The only coal to be bought in the open market was for sale only at prices greatly in excess of the Government price."

Answer: "Affirmed."

3. The learned trial Judge erred in affirming plaintiff's 20th request for finding of fact, which request and the answer thereto were as follows:

"20. The market price of coal, that is the price at which coal was actually sold by sellers to buyers who did not have long term contracts for the coal, rapidly rose after the beginning of 1919. In the spring of 1919 it rose from $6 to $8 per net ton at the mines and in the early fall it sold as high as $12.50 or $15 per net ton."

Answer: "Affirmed."

4. The learned trial Judge erred in affirming plaintiff's 21st request for finding of fact, which request and the answer thereto were as follows:

"21. At the time this coal was seized by the defendant and at the time it should have been delivered to the plaintiff in the normal course of transportation, the market price at Philadelphia was $6.44 per net ton for coal of a grade inferior to that taken by the defendant. It was impossible at any price at that time to get coal in Philadelphia of the grade seized by the defendant."

Answer: "Affirmed."

5. The learned trial Judge erred in affirming plaintiff's 22nd request for finding of fact, which request and the answer thereto were as follows:

"22. The plaintiff was damaged by the defendant's action in seizing the coal in the amount of the difference between the cost of the coal seized by the defendant and its value at $6.44 per net

ton, plus interest thereon from March 1, 1920, to the date of judgment. This amounted to $6,604.20, plus interest in the case of the coal seized on the Pennsylvania Railroad, and $2,757.73 plus interest in the case of the coal seized on the Philadelphia & Reading Railway."

Answer: "Affirmed."

6. The learned trial Judge erred in affirming plaintiff's first request for conclusion of law, which request and the answer thereto were as follows:

"1. The 80 cars of coal shipped to the plaintiff and seized on the Pennsylvania Railroad and the 33 cars of coal shipped to the plaintiff and seized on the Philadelphia & Reading Railway were the property of the plaintiff at the time they were seized."

Answer: "Affirmed."

7. The learned trial Judge erred in affirming plaintiff's second request for conclusion of law, which request and the answer thereto were as follows:

"2. The seizure of the coal was an unlawful conversion."

Answer: "Affirmed."

8. The learned trial Judge erred in affirming plaintiff's third request for conclusion of law, which request and the answer thereto were as follows:

"3. The plaintiff is entitled to recover as damages the market value of the coal at the time and at the place when it should have been delivered to the plaintiff minus freight charges and war tax and the amount which the defendant has paid to the shippers of the coal."

Answer: "Affirmed."

9. The learned trial Judge erred in affirming

plaintiff's fourth request for conclusion of law, which request and the answer thereto were as follows:

> "4. In determining the market value of the coal seized by the Director General of Railroads, the Court cannot take into consideration the prices fixed or the other regulations issued by the Director General himself."
>
> Answer: "Affirmed."

10. The learned trial Judge erred in affirming plaintiff's fifth request for conclusion of law, which request and the answer thereto were as follows:

> "5. The plaintiff is entitled to recover from the defendant the amount it had to pay to replace the coal seized by the defendant minus the amounts which it would have had to pay as contract purchase price, freight charges and war tax on the coal seized."
>
> Answer: "Affirmed."

11. The learned trial Judge erred in affirming plaintiff's tenth request for conclusion of law, which request and the answer thereto were as follows:

> "10. The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit."
>
> Answer: "Affirmed."

12. The learned trial Judge erred in affirming plaintiff's eleventh request for conclusion of law, which request and the answer thereto were as follows:

> "11. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Pennsylvania Railroad, in the sum

of $6,604.20, with interest from March 1, 1920, to the date of judgment at 6 per cent. per annum."
Answer: "Affirmed."

13. The learned trial Judge erred in refusing to affirm defendant's 2nd request for finding of fact, which request and the answer thereto were as follows:

"2. Under plaintiff's oral contract with The Berwind White Coal Mining Company, the latter only agreed to ship to plaintiff as much coal as it could, so plaintiff was not in a position to rely on the Berwind White Coal Mining Company as the source of its supply of coal.
Answer: "Refused. This is immaterial since the coal in suit was actually delivered."

14. The learned trial Judge erred in refusing to affirm defendant's 3rd request for finding of fact, which request and the answer thereto were as follows:

"3. Plaintiff's contract for the purchase of coal from Madeira Hill & Co., which was made prior to February, 1920, contained the following provision:
'It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administrator, dated December 24th, 1917, and effective December 29th, 1917, all of the terms and provisions of which are hereby incorporated herein, with the same force and effect as if the same were set forth at length.'
Answer: "Refused. See answer to No. 2."

15. The learned trial Judge erred in refusing to affirm without qualification defendant's 4th request for finding of fact, which request and the answer thereto were as follows:

"4. Plaintiff's contract for the purchase of coal from Whitney & Kemmerer contained a provision that the contract was subject to any rules and regulations which might be made by the United States Fuel Administration."

Answer: "Affirmed. The contract contained such a clause but the only regulation referred to by the defendant was that of July 17, 1919 which applied to 'coal deliverable' under a contract, provided for 'requisition prior to actual receipt.' This regulation had no application to the coal in suit which was delivered to plaintiff f. o. b. mines."

16. The learned trial Judge erred in refusing to affirm without qualification defendant's 5th request for finding of fact, which request and the answer thereto were as follows:

"5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:

'This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M., December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as if set forth at length'."

Answer: "Affirmed. See answer to No. 4."

17. The learned trial Judge erred in refusing to affirm without qualification defendant's 6th request for finding of fact, which request and the answer thereto were as follows:

"6. Plaintiff's contract for the purchase of coal from Commercial Coal Mining Company contained the following provision:

'That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919'."
Answer: "Affirmed. See answer to No. 4."

18. The learned trial Judge erred in refusing to affirm defendant's 7th request for finding of fact, which request and the answer thereto were as follows:

"7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months in 1920."
Answer: "Refused as immaterial."

19. The learned trial Judge erred in refusing to affirm defendant's 8th request for finding of fact, which request and the answer thereto were as follows:—

"8. During the period from November 1st, 1919, to March, 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration and coal was so diverted and settlement therefor was made by plaintiff with the shippers of such coal at the prices established by the United States Fuel Administration."
Answer: "Refused as immaterial."

20. The learned trial Judge erred in refusing to affirm defendant's first request for conclusion of law, which request and the answer thereto were as follows:—

"1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforceable during the period covered by this suit."
Answer: "Refused."

21. The learned trial Judge erred in refusing to affirm defendant's third request for conclusion of law, which request and the answer thereto were as follows:—

"3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919, to March 1st, 1920, making requests for diversion of coal to it and setting therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the price fixed by such regulations for coal consigned to it which was diverted to other parties."

Answer: "Refused."

22. The learned trial Judge erred in refusing to affirm defendant's fourth request for conclusion of law, which request and the answer thereto were as follows:—

"4. There is no liability on the part of the defendants named in these actions to plaintiff as plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276."

Answer: "Refused."

23. The learned trial Judge erred in refusing to affirm defendant's fifth request for conclusion of law, which request and the answer thereto were as follows:—

"5. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Pennsylvania Railroad, and judgment is therefore entered in favor of said defendant and against the said plaintiff."

Answer: "Refused."

24. The learned trial Judge erred in finding as a fact the following:—

"1. That the defendant on March 1, 1920, confiscated 80 cars of coal, aggregating 4,577.55 net tons, the property of the plaintiff."

25. The learned trial Judge erred in finding as a fact the following:—

"2. The cost of said coal to the plaintiff at Philadelphia was $22,875.22 and the market value at the time it was converted by the defendant, to wit, March 1, 1920, was (delivered at Philadelphia), $6.44 a net ton or $29,479.42."

26. The learned trial Judge erred in finding as an additional conclusion of law the following:—

"1. That on the facts found the defendant is liable to pay to the plaintiff the market value of the coal converted, i. e. $29,479.42 less the amount already paid, i. e. $22,875.22, with interest on the balance from March 1, 1920."

CHARLES MYERS,
JOHN HAMPTON BARNES,
Attorneys for Defendant.

XVIII. **Brief Statement under Supreme Court Rule 58 of Reasons for Dismissing the Exceptions filed in Newton Coal Company vs. Director General of Railroads, operating the Philadelphia & Reading Railway.**

Per Curiam.

The trial Judge's discussion of the case fully covers all questions raised by defendants' Exceptions to his findings. His conclusions therein were reached by rea-

soning which we approve as correct. Nothing can with profit be added to what he has said. His findings of law and fact are adopted in toto.

XIX. Brief Statement under Supreme Court Rule 58 of Reasons for Dismissing the Exceptions filed in Newton Coal Company vs. Director General of Railroads, operating the Pennsylvania Railroad.

Per Curiam.

This case was tried jointly with a similar case at the suit of the same plaintiff against the same defendant with respect to his operation of the Philadelphia & Reading Railway. The Trial Judge's discussion of both cases (filed to the term and number of the latter case) fully covers all questions raised by defendants' Exceptions herein to his findings. His conclusions therein were reached by reasoning which we approve as correct. His findings of law and fact are adopted in toto.

XX. Final Judgment in Newton Coal Company vs. Director General of Railroads, operating the Philadelphia & Reading Railway.

December 18th, 1923. Judgment on findings in favor of plaintiff.

Eo die, Damages assessed at $3,386.49.

XXI. Final Judgment in Newton Coal Company vs. Director General of Railroads, operating the Pennsylvania Railroad.

December 18, 1923. Judgment on findings in favor of plaintiff.

Eo die, Damages assessed at $8,109.95.

**IN SUPREME COURT OF PENNSYLVANIA,
OCTOBER TERM, 1924**

No. —

JAMES C. DAVIS, Director General of Railroads, Operating Philadelphia & Reading Railway, Plaintiff-in-Error,

vs.

GEORGE B. NEWTON COAL COMPANY, Defendant-in-Error

No. —

JAMES C. DAVIS, Director General of Railroads, Operating Pennsylvania Railroad, Plaintiff-in-Error,

vs.

GEORGE B. NEWTON COAL COMPANY, Defendant-in-Error

STIPULATION CONSOLIDATING CASES UNDER ONE RECORD—Filed Oct. 17, 1924

It is agreed that the above-entitled cases may be consolidated and argued before the Supreme Court of the United States upon one record, which shall consist of the following:

1. The record used in the Supreme Court of Pennsylvania.

2. The opinion of the Supreme Court of Pennsylvania.

3. The Assignments of Error, eliminating from the printing, where possible, those assignments which are identical in each of the two cases.

4. The Docket Entries in each of the two cases.

5. The Writs of Error.

6. The Citations.

7. The Bonds, or so much thereof as may be required by the Rules of the Supreme Court.

Wm. Clarke Mason, John Hampton Barnes, Counsel for James C. Davis, Director General of Railroads, &c., Plaintiff in Error, Allen S. Olmsted, 2nd, Counsel for George B. Newton Coal Co., Defendant-in-Error.

[File endorsement omitted.]

In Supreme Court of Pennsylvania, January Term, 1925

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Docket Entries

No. 1367, June Term, 1921

George B. Newton Coal Company, Plaintiff,

v.

James C. Davis, Director General of Railroads, as Agent of the President, Operating Philadelphia & Reading Railway, Defendant

Appeal of Defendant from the Judgment

3/13/24.
Allen S. Olmsted, 2d.
Wm. Clarke Mason.

Appeal from Court Common Pleas No. 4 of the County of Philadelphia.
Filed March 7, 1924.
Eo die, Certiorari exit, Retble. first Monday January, 1925.
May 5, 1924.—Record returned and filed.
May 9, 1924.—Assignments of Error filed.
March 17, 1924.—Petition to place on Special list for week of May 12th, filed.
3/18/24.—Granted. (By oral order of C. J.)
March 18, 1924.—Certificate exit and sent to Prothonotary of Philadelphia Co.
Eo die.—Acknowledgment of certificate received and filed.
May 13, 1924.—Argued.
July 8, 1924.—All the assignments are overruled and the judgment of the court below is affirmed. Opinion by Kephart, J.

And now, this 16th day of July, A. D. 1924, on motion of William Clarke Mason, Esq., counsel for appellant in above entitled case, and upon the representation of counsel that the appellant will present to the Supreme Court of the United States a petition in the above entitled case for a writ of error therein, it is—
Ordered that the record in the above entitled case be held by the Prothonotary of this Court and be not remitted to Court Common Pleas No. 4, of Philadelphia County, until the expiration of thirty days from the date hereof.

Simpson, J.

August 12, 1924.—Petition for reargument filed. Wm. Clarke Mason, Atty. for defendant.
Sept. 25, 1924—Refused. Per Curiam.
August 12, 1924.—Petition to Supreme Court for Writ of Error filed. Wm. Clarke Mason, Atty.

August 19, 1924.—Affidavit of service of copies of petitions for reargument and writs of error filed.

September 23, 1924.—Upon consideration of the foregoing petition for writ of error, it is hereby ordered that the petition be granted, and that a writ of error issue from the Supreme Court of the United States to the Supreme Court of Pennsylvania, and that a certified transcript of the record, proceedings and papers in this cause be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that a bond on appeal be fixed in the sum of Two hundred and fifty ($250) Dollars.

Robt. von Moschzisker, Chief Justice of Pennsylvania.

September 23, 1924.—Writ of Error to the Supreme Court of the United States filed. Allowed by Hon. Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania

September 30, 1924.—Citation with acceptance of service endorsed thereon brought into office.

October 1, 1924.—Bond for $250 brought into office. Approved by Hon Robert von Moschzisker, Chief Justice of Supreme Court of Pennsylvania.

October 17, 1924.—Stipulation to consolidate and as to printing Record filed.

October 21, 1924.—Assignments of Error to the Supreme Court of the United States brought into office.

October 22, 1924.—Transcript of Record exit and sent to Clerk of the Supreme Court of the United States.

In Supreme Court of Pennsylvania, January Term, 1925

34

Docket Entries

No. 1369, June Term, 1921

George B. Newton Coal Company, Plaintiff,

v.

James C. Davis, Director General of Railroads, Agent, Defendant

Appeal of Defendant from the Judgment

3/12/24.

Allen S. Olmstead, 2d.

Charles Myers, Barnes, Biddle & Morris.

Appeal from Court Common Pleas No. 4 of the County of Philadelphia.

Filed March 7, 1924.

Eo die, Certiorari exit, Retble first Monday January, 1925.

May 5, 1924.—Record returned and filed.

May 9, 1924.—Assignments of Error filed.

March 17, 1924.—Petition to place on Special List for week of May 12th filed.

3/18/24.—Granted (by oral order of C. J.).

April 8, 1924.—Certificate exit and sent to Prothonotary of Philadelphia Co.

April 9, 1924.—Acknowledgment of Certificate received and filed.

May 13, 1924.—Argued.

July 8, 1924.—All the assignments are overruled and the judgment of the court below is affirmed. Opinion by Kephart, J.

And now, this 16th day of July, A. D. 1924, on motion of Charles Myers, Esq., and John Hampton Barnes, Esq., counsel for appellant in above entitled case, and upon the representation of counsel that the appellant will present to the Supreme Court of the United States a petition in the above entitled case for a writ of error, it is

Ordered that the record in the above entitled case be held by the Prothonotary of this Court and be not remitted to Court of Common Pleas No. 4, of Philadelphia County, until the expiration of thirty days from the date hereof.

Simpson, J.

August 12, 1924.—Petition for reargument and Writ of Error filed. Charles Myers, John Hampton Barnes.

August 19, 1924.—Affidavit of service of petitions for reargument and writs of error received and filed.

September 23, 1924.—Upon consideration of the foregoing petition for writ of error, it is hereby ordered that the petition be granted, and that a writ of error issue from the Supreme Court of the United States to the Supreme Court of Pennsylvania, and that a certified transcript of the record, proceedings and papers in this cause be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that a bond on appeal be fixed in the sum of Two hundred and fifty ($250) Dollars.

Robt. von Moschzisker, Chief Justice of Pennsylvania.

September 23, 1924.—Writ of Error to the Supreme Court of the United States filed. Allowed by Hon. Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

September 30, 1924.—Citation with acceptance of service endorsed thereon brought into office.

October 14, 1924.—Bond for $250 brought into office. Approved by Hon. Robert von Moschzisker, Chief Justice of Supreme Court of Pennsylvania.

October 17, 1924.—Stipulation to consolidate and as to printing Record filed.

October 21, 1924.—Assignments of Error to the Supreme Court of the United States brought into office.

October 22, 1924.—Transcript of Record exit and sent to Clerk of Supreme Court of the United States.

IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

III. ASSIGNMENTS OF ERROR—Filed May 9, 1924

1. The learned Court below erred in dismissing defendant's first Exception, said Exception and the Order dismissing the same being as follows:

"1. The learned trial Judge erred in affirming plaintiff's 13th request for finding of fact, which request and the answer thereto were as follows:

"'13. The orders of October 30, and Ocotber 31 were issued to meet the emergency caused by the nation wide coal strike called to begin Novem'er 1, 1919.'
"Answer. 'Affirmed'" (page 113a).

December 12th, 1923, Exceptions dismissed (page 1a).

Per CURIAM:

"The trial Judge's discussion of the case fully covers all questions raised by defendants' Exceptions to his findings. His conclusions therein were reached by reasoning which we approve as correct. Nothing can with profit be added to what he has said. His findings of law and fact are adopted in toto" (page 129a).

2. The learned Court below erred in dismissing defendant's second Exception, said Exception and the order dismissing the same being as follows:

"2. The learned trial Judge erred in affirming plaintiff's 19th request for finding of fact, which request and the answer thereto were as follows:

"'19. Coal was being sold and delivered on contract at the Government price at the time this coal was seized, but it was impossible to buy coal not covered by contract at such a price. The only coal to be bought in the open market was for sale only at prices greatly in excess of the Government price.'
"Answer. 'Affirmed'" (page 113a).

December 12th, 1923—Exceptions dismissed (page 1a). (See Order, page 129a.)

3. The learned Court below erred in dismissing defendant's third Exception, said Exception and the Order dismissing the same being as follows:

"3. The learned trial Judge erred in affirming plaintiff's 20th request for finding of fact, which request and the answer thereto were as follows:

" '20. The market price of coal, that is the price at which coal was actually sold by sellers to buyers who did not have long term contracts for the coal, rapidly rose after the beginning of 1919. In the spring of 1919 it rose from $6 to $8 per ton at the mines and in the early fall it sold as high as $12.50 or $15 per net ton.'

"Answer. 'Affirmed' " (page 114a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

4. The learned Court below erred in dismissing defendant's fourth Exception, said Exception and the Order dismissing the same being as follows:

"4. The learned trial Judge erred in affirming plaintiff's 21st request for finding of fact, which request and the answer thereto were as follows:

" '21. At the time this coal was seized by the defendant and at the time it should have been delivered to the plaintiff in the normal course of transportation, the market price at Philadelphia was $6.44 per net ton for coal of a grade inferior to that taken by the defendant. It was impossible at any price at that time to get coal in Philadelphia of the grade seized by the defendant.'

"Answer. 'Affirmed' " (page 114a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

5. The learned Court below erred in dismissing defendant's fifth Exception, said Exception and the Order dismissing the same being as follows:

"5. The learned trial Judge erred in affirming plaintiff's 22nd request for finding of fact, which request and the answer thereto were as follows:

" '22. The plaintiff was damaged by the defendant's action in seizing the coal in the amount of the difference between the cost of the coal seized by the defendant and its value at $6.44 per net ton, plus interest thereon from March 1, 1920, to the date of judgment. This amounted to $6,604.20, plus interest in the case of the coal seized on the Pennsylvania Railroad, and $2,757.73 plus interest in the case of the coal seized on the Philadelphia and Reading Railway.'

"Answer. 'Affirmed' " (page 114a).

December 12th, 1923.—Exceptions dismissesd (page 1a). (See Order, page 129a.)

6. The learned Court below erred in dismissing defendant's sixth Exception, said Exception and the Order dismissing the same being as follows:

"6. The learned trial Judge erred in affirming plaintiff's first request for conclusion of law, which request and the answer thereto were as follows:

" '1. The 80 cars of coal shipped to the plaintiff and seized on the Pennsylvania Railroad and the 33 cars of coal shipped to the plaintiff and seized on the Philadelphia & Reading Railway were the property of the plaintiff at the time they were seized.'
"Answer. 'Affirmed' " (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

7. The learned Court below erred in dismissing defendant's seventh Exception, said Exception and the Order dismissing the same being as follows::

"7. The learned trial Judge erred in affirming plaintiff's second request for conclusion of law, which request and the answer thereto were as follows:

" '2. The seizure of the coal was an unlawful conversion.'
"Answer. 'Affirmed' " (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

8. The learned Court below erred in dismissing defendant's eighth Exception, said Exception and the Order dismissing the same being as follows:

"8. The learned trial Judge erred in affirming plaintiff's third request for conclusion of law, which request and the answer thereto were as follows:

" '3. The plaintiff is entitled to recover as damages the market value of the coal at the time and at the place when it should have been delivered to the plaintiff minus freight charges and war tax and the amount which the defendant has paid to the shippers of the coal.'
"Answer. 'Affirmed' " (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

9. The learned Court below erred in dismissing defendant's ninth Exception, said Exception and the Order dismissing the same being as follows:

"9. The learned trial Judge erred in affirming plaintiff's fourth request for conclusion of law, which request and the answer thereto were as follows:

" '4. In determining the market value of the coal seized by the Director General of Railroads, the Court cannot take into consideration the prices fixed or the other regulations issued by the Director General himself.'

"Answer. 'Affirmed' " (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

10. The learned Court below erred in dismissing defendant's tenth Exception, said Exception and the Order dismissing the same being as follows:

"10. The learned trial Judge erred in affirming plaintiff's fifth request for conclusion of law, which request and the answer thereto were as follows:

" '5. The plaintiff is entitled to recover from the defendant the amount it had to pay to replace the coal seized by the defendant minus the amounts which it would have had to pay as contract purchase price, freight charges and war tax on the coal seized.'

"Answer. 'Affirmed' " (page 116a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

11. The learned Court below erred in affirming plaintiff's tenth eleventh Exception, said Exception and the Order dismissing the same being as follows:

"11. The learned trial Judge erred in affirming plaintiff's tenth request for conclusion of law, which request and the answer thereto were as follows:

" '10. The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit.'

"Answer. 'Affirmed' " (page 116a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

12. The learned Court below erred in dismissing defendant's twelfth Exception, said Exception and the Order dismissing the same being as follows:

"12. The learned trial judge erred in affirming plaintiff's twelfth request for conclusion of law, which request and the answer thereto were as follows:

" '12. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Philadelphia & Reading Railway in the sum of

$2,757.73 with interest from March 1, 1920, to the date of judgment at 6 per cent per annum.'

"Answer. 'Affirmed'" (page 116a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

13. The learned Court below erred in dismissing defendant's thirteenth Exception, said Exception and the Order dismissing the same being as follows:

"13. The learned trial Judge erred in refusing to affirm defendant's 2nd request for finding of fact, which request and the answer thereto were as follows:

"'2. Under plaintiff's oral contract with The Berwind White Coal Mining Company, the latter only agreed to ship to plaintiff as much coal as it could, so plaintiff was not in a position to rely on the Berwind White Coal Mining Company as the source of its supply of coal.'

"Answer. 'Refused. This is immaterial since the coal in suit was actually delivered'" (page 117a).

December 12th, 1923.—Exceptions dismissed (page 1a). See Order, page 129a.)

14. The learned Court below erred in dismissing defendant's fourteenth Exception, said Exception and the Order dismissing the same being as follows:

"14. The learned Judge erred in refusing to affirm defendant's 3rd request for finding of fact, which request and the answer thereto were as follows:

"'3. Plaintiff's contract for the purchase of coal from Madeira, Hill & Co., which was made prior to February, 1920, contained the following provision:

"It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administrator, dated December 24th, 1917, and effective December 29th, 1917, all of the terms and provisions of which are hereby incorporated herein, with the same force and effect as if the same were set forth at length."'

"Answer. 'Refused.' See Answer to No. 2." (page 117a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

15. The learned Court below erred in dismissing defendant's fifteenth Exception, said Exception and the Order dismissing the same being as follows:

"15. The learned Trial Judge erred in refusing to affirm without qualification defendant's 4th request for finding of fact, which request and the answer thereto were as follows:

" '4. Plaintiff's contract for the purchase of coal from Whitney & Kemmerer contained a provision that the contract was subject to any rules and regulations which might be made by the United States Fuel Administration.

"Answer. 'Affirmed. The contract contained such a clause but the only regulation referred to by the defendant was that of July 17, 1919, which applied to "coal deliverable" under a contract, provided for "requisition prior to actual receipt." This regulation had no application to the coal in suit which was delivered to plaintiff f. o. b. mines.' " (Page 117a.)

December 12th, 1923, Exceptions dismissed (page 1a). (See Order, page 129a.)

16. The learned Court below erred in dismissing defendant's sixteenth Exception, said Exception and the Order dismissing the same being as follows:

"16. The learned Trial Judge erred in refusing to affirm without qualification defendant's 5th request for finding of fact, which request and the answer thereto were as follows:

" '5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:

" ' "This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as if set forth at length." '

"Answer. 'Affirmed.' " See answer to No. 4 (page 118a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

17. The learned Court below erred in dismissing defendant's seventeenth Exception, said Exception and the Order dismissing the same being as follows:

"17. The learned Trial Judge erred in refusing to affirm without qualification defendant's 6th request for finding of fact, which request and the answer thereto were as follows:

" '6. Plaintiff's contract for the purchase of coal from Commercial Coal Mining Company contained the following provision:

" ' "That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919." '

"Answer. 'Affirmed.' " See answer to No. 4 (page 118a).

December 12th, 1923.—Exception dismissed (page 1a). (See Order, page 129a.)

18. The learned Court below erred in dismissing defendant's eighteenth Exception, said Exception and the Order dismissing the same being as follows:

"18. The learned Trial Judge erred in refusing to affirm defendant's 7th request for finding of fact, which request and the answer thereto were as follows:

" '7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months in 1920.'
"Answer. 'Refused as immaterial' " (page 119a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

19. The learned Court below erred in dismissing defendant's nineteenth Exception, said Exception and the Order dismissing the same being as follows:

"19. The learned Trial Judge erred in refusing to affirm defendant's 8th request for finding of fact, which request and the answer thereto were as follows:

" '8. During the period from November 1st, 1919, to March, 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration and coal was so diverted and settlement therefor was made by plaintiff with the shippers of such coal at the prices established by the United States Fuel Administration.'
"Answer. 'Refused as immaterial' " (page 119a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

20. The learned Court below erred in dismissing defendant's twentieth Exception, said Exception and the Order dismissing the same being as follows:

"20. The learned Trial Judge erred in refusing to affirm defendant's first request for conclusion of law, which request and the answer thereto were as follows:

" '1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforcible during the period covered by this suit."
"Answer. 'Refused' " (page 119a).

December 12th, 1923.—Exception dismissed (page 1a). (See Order, page 129a.)

21. The learned Court below erred in dismissing defendant's twenty-first Exception, said Exception and the Order dismissing the same being as follows:

"21. The learned Trial Judge erred in refusing to affirm defendant's third request for conclusion of law, which request and the answer thereto were as follows:

" '3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919, to March 1st, 1920, making requests for diversion of coal to it and settling therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the price fixed by such regulations for coal consigned to it which was diverted to other parties.'

"Answer. 'Refused' " (page 120a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

22. The learned Court below erred in dismissing defendant's twenty-second Exception, said Exception and the Order dismissing the same being as follows:

"22. The learned Trial Judge erred in refusing to affirm defendant's fourth request for conclusion of law, which request and the answer thereto were as follows:

" '4. There is no liability on the part of the defendants named in these actions to plaintiff as plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276.'

"Answer. 'Refused' " (page 120a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

23. The learned Court below erred in dismissing defendant's twenty-third Exception, said Exception and the Order dismissing the same being as follows:

"23. The learned Trial Judge erred in refusing to affirm defendant's sixth request for conclusion of law, which request and the answer thereto were as follows:

" '6. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Philadelphia and Reading Railway and judgment is therefore entered in favor of said defendant and against the said plaintiff.'

"Answer. 'Refused' " (page 120a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

24. The learned Court below erred in entering judgment in favor of plaintiff and against defendant, as follows:

"Dec. 18, 1923.—Judgment on findings in favor of plaintiff.
"Eo die, Damages assessed at $3,386.49" (page 1a).
(Signed) Wm. Clarke Mason, Attorney for Appellant.

[File endorsement omitted.]

IN SUPREME COURT OF PENNSYLVANIA

No. 34

[Title omitted]

ASSIGNMENTS OF ERROR—Filed May 9, 1924

1. The learned Court below erred in dismissing defendant's first Exception, said Exception and the Order dismissing the same being as follows:

"1. The learned Trial Judge erred in affirming plaintiff's 13th request for finding of fact, which request and the answer thereto were as follows:

" 'The orders of October 30, and October 31 were issued to meet the emergency caused by the nation wide coal strike called to begin November 1, 1919.'
"Answer. 'Affirmed' " (page 121a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). Per Curiam:

"This case was tried jointly with a similar case at the suit of the same plaintiff against the same defendant with respect to his operation of the Philadelphia & Reading Railway. The Trial Judge's discussion of both cases (filed to the term and number of the latter case) fully covers all questions raised by defendants' Exceptions herein to his findings. His conclusions therein were reached by reasoning which we approve as correct. His findings of law and fact are adopted in toto" (page 130a).

2. The learned Court below erred in dismissing defendant's second Exception, said Exception and the Order dismissing the same being as follows:

"2. The learned Trial Judge erred in affirming plaintiff's 19th request for finding of fact, which request and the answer thereto were as follows:

" '19. Coal was being sold and delivered on contract at the Government price at the time this coal was seized, but it was impossible to buy coal not covered by contract at such a price. The only coal to be bought in the open market was for sale only at prices greatly in excess of the Government price.'

"Answer. 'Affirmed' " (page 121a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a).

3. The learned Court below erred in dismissing defendant's third Exception, said Exception and the Order dismissing the same being as follows:

"3. The learned Trial Judge erred in affirming plaintiff's 20th request for finding of fact, which request and the answer thereto were as follows:

" '20. The market price of coal, that is the price at which coal was actually sold by sellers to buyers who did not have long term contracts for the coal, rapidly rose after the beginning of 1919. In the spring of 1919 it rose from $6 to $8 per ton at the mines and in the early fall it sold as high as $12.50 or $15 per net ton.'

"Answer. 'Affirmed' " (page 122a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

4. The learned Court below erred in dismissing defendant's fourth Exception, said Exception and the Order dismissing the same being as follows:

"4. The learned Trial Judge erred in affirming plaintiff's 21st request for finding of fact, which request and the answer thereto were as follows:

" '21. At the time this coal was seized by the defendant and at the time it should have been delivered to the plaintiff in the normal course of transportation, the market price at Philadelphia was $6.44 per net ton for coal of a grade inferior to that taken by the defendant. It was impossible at any price at that time to get coal in Philadelphia of the grade seized by the defendant.'

"Answer. 'Affirmed' " (page 122a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

5. The learned Court below erred in dismissing defendant's fifth Exception, said Exception and the Order dismissing the same being as follows:

"5. The learned Trial Judge erred in affirming plaintiff's 22nd request for finding of fact, which request and the answer thereto were as follows:

"'22. The plaintiff was damaged by the defendant's action in seizing the coal in the amount of the difference between the cost of the coal seized by the defendant and its value at $6.44 per net ton, plus interest thereon from March 1, 1920 to the date of judgment. This amounted to $6,604.20, plus interest in the case of the coal seized on the Pennsylvania Railroad, and $2,757.73 plus interest in the case of the coal seized on the Philadelphia and Reading Railway.'
"Answer. 'Affirmed'" (page 122a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

6. The learned Court below erred in dismissing defendant's sixth Exception, said Exception and the Order dismissing the same being as follows:

"6. The learned Trial Judge erred in affirming plaintiff's first request for conclusion of law, which request and the answer thereto were as follows:

"'1. The 80 cars of coal shipped to the plaintiff and seized on the Pennsylvania Railroad and the 33 cars of coal shipped to the plaintiff and seized on the Philadelphia & Reading Railway were the property of the plaintiff at the time they were seized.'
"Answer. 'Affirmed'" (page 123a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

7. The learned Court below erred in dismissing defendant's seventh Exception, said Exception and the Order dismissing the same being as follows:

"7. The learned Trial Judge erred in affirming plaintiff's second request for conclusion of law, which request and the answer thereto were as follows:

"'2. The seizure of the coal was an unlawful conversion.'
"Answer. 'Affirmed'" (page 123a).

December 12th, 1923.—Exceptions dismissed (page 2a). (See Order, page 130a.)

8. The learned Court below erred in dismissing defendant's eighth Exception, said Exception and the Order dismissing the same being as follows:

"8. The learned Trial Judge erred in affirming plaintiff's third request for conclusion of law, which request and the answer thereto were as follows:

"'3. The plaintiff is entitled to recover as damages the market value of the coal at the time and at the place when it should have been

delivered to the plaintiff minus freight charges and war tax and the amount which the defendant has paid to the shippers of the coal.'
"Answer. 'Affirmed' " (page 123a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

9. The learned Court below erred in dismissing defendant's ninth Exception, said Exception and the Order dismissing the same being as follows:

"9. The learned Trial Judge erred in affirming plaintiff's fourth request for conclusion of law, which request and the answer thereto were as follows:

" '4. In determining the market value of the coal seized by the Director General of Railroads, the court cannot take into consideration the prices fixed or the other regulations issued by the Director General himself.'
"Answer. 'Affirmed' " (page 123a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

10. The learned Court below erred in dismissing defendant's tenth Exception, said Exception and the Order dismissing the same being as follows:

"10. The learned Trial Judge erred in affirming plaintiff's fifth request for conclusion of law, which request and the answer thereto were as follows:

" '5. The plaintiff is entitled to recover from the defendant the amount it had to pay to replace the coal seized by the defendant minus the amounts which it would have had to pay as contract purchase price, freight charges and war tax on the coal seized.'
"Answer. 'Affirmed' " (page 124a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

11. The learned Court below erred in dismissing defendant's eleventh Exception, said Exception and the Order dismissing the same being as follows:

"11. The learned Trial Judge erred in affirming plaintiff's tenth request for conclusion of law, which request and the answer thereto were as follows:

" '10. The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit.'
"Answer. 'Affirmed' " (page 124a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

12. The learned Court below erred in dismissing defendant's twelfth Exception, said Exception and the Order dismissing the same being as follows:

"12. The learned Trial Judge erred in affirming plaintiff's twelfth request for conclusion of law, which request and the answer thereto were as follows:

"'12. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Philadelphia & Reading Railway in the sum of $2,757.73 with interest from March 1, 1920, to the date of judgment at 6% per annum.'

"Answer. 'Affirmed'" (page 124a).

December 12th, 1923.—Defendant's exceptions dismissed (page 2a). (See Order, page 130a.)

13. The learned Court below erred in dismissing defendant's thirteenth Exception, said Exception and the Order dismissing the same being as follows:

"13. The learned Trial Judge erred in refusing to affirm defendant's 2nd request for finding of fact, which request and the answer thereto were as follows:

"'2. Under plaintiff's oral contract with The Berwind White Coal Mining Company, the latter only agreed to ship to plaintiff as much coal as it could, so plaintiff was not in a position to rely on the Berwind White Coal Mining Company as the source of its supply of coal.'

"Answer. 'Refused. This is immaterial since the coal in suit was actually delivered'" (page 125a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

14. The learned Court below erred in dismissing defendant's fourteenth Exception, said Exception and the Order dismissing the same being as follows:

"14. The learned Trial Judge erred in refusing to affirm defendant's 3rd request for finding of fact, which request and the answer thereto were as follows:

"'3. Plaintiff's contract for the purchase of coal from Madeira Hill & Co., which was made prior to February 1920, contained the following provision:

"'"It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administrator, dated December 24th, 1917, and effective

December 29th, 1917, all of the terms and provisions of which are hereby incorporated herein, with the same force and effect as if the same were set forth at length.'' '.

"Answer. 'Refused.' " See Answer to No. 2 (page 125a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

15. The learned Court below erred in dismissing defendant's fifteenth Exception, said Exception and the Order dismissing the same being as follows:

"15. The learned Trial Judge erred in refusing to affirm without qualification defendant's 4th request for finding of fact, which request and the answer thereto were as follows:

" '4. Plaintiff's contract for the purchase of coal from Whitney & Kemmerer contained a provision that the contract was subject to any rules and regulations which might be made by the United States Fuel Administrator.'

"Answer. 'Affirmed. The contract contained such a clause but the only regulation referred to by the defendant was that of July 17, 1919 which applied to "coal deliverable" under a contract, provided for "requisition prior to actual receipt." This regulation had no application to the coal in suit which was delivered to plaintiff f. o. b. mines' " (page 125a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

16. The learned Court below erred in dismissing defendant's sixteenth Exception, said Exception and the Order dismissing the same being as follows:

"16. The learned Trial Judge erred in refusing to affirm without qualification defendant's 5th request for finding of fact, which request and the answer thereto were as follows:

" '5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:

" ' "This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as is set forth at length.' "

"Answer. 'Affirmed.' " See answer to No. 4 (page 126a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

17. The learned Court below erred in dismissing defendant's seventeenth Exception, said Exception and the Order dismissing the same being as follows:

"17. The learned Trial Judge erred in refusing to affirm without qualification defendant's 6th request for finding of fact, which request and the answer thereto were as follows:

" '6. Plaintiff's contract for the purchase of coal from Commercial Coal Mining Company contained the following provision:

" ' "That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919.' "

"Answer. 'Affirmed.' " See answer to No. 4 (page 126a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

18. The learned Court below erred in dismissing defendant's eighteenth Exception, said Exception and the Order dismissing the same being as follows:

"18. The learned Trial Judge erred in refusing to affirm defendant's 7th request for finding of fact, which request and the answer thereto were as follows:

" '7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months in 1920.'

"Answer. 'Refused as immaterial' " (page 127a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

19. The learned Court below erred in dismissing defendant's nineteenth Exception, said Exception and the Order dismissing the same being as follows:

"19. The learned Trial Judge erred in refusing to affirm defendant's 8th request for finding of fact, which request and the answer thereto were as follows:

" '8. During the period from November 1st, 1919 to March 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration and coal was so diverted and settlement therefor was made by plaintiff with the shippers of such coal at the prices established by the United States Fuel Administration.'

"Answer. 'Refused as immaterial' " (page 127a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

20. The learned Court below erred in dismissing defendant's twentieth Exception, said Exception and the Order dismissing the same being as follows:

"20. The learned Trial Judge erred in refusing to affirm defendant's first request for conclusion of law, which request and the answer thereto were as follows:

" '1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforcible during the period covered by this suit.'
"Answer. 'Refused' " (page 127a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

21. The learned Court below erred in dismissing defendant's twenty-first Exception, said Exception and the Order dismissing the same being as follows:

"21. The learned trial Judge erred in refusing to affirm defendant's third request for conclusion of law, which request and the Answer thereto were as follows:

" '3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919 to March 1st, 1920, making requests for diversion of coal to it and settling therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the price fixed by such regulations for coal consigned to it which was diverted to other parties.'
"Answer. 'Refused' " (page 128a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

22. The learned Court below erred in dismissing defendant's twenty-second Exception, said Exception and the Order dismissing the same being as follows:

"22. The learned trial Judge erred in refusing to affirm defendant's fourth request for conclusion of law, which request and the answer thereto were as follows:

" '4. There is no liability on the part of the defendants named in these actions to plaintiff as plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276.'
"Answer. 'Refused' " (page 128a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

23. The learned Court below erred in dismissing defendant's twenty-third Exception, said Exception and the Order dismissing the same being as follows:

"23. The learned Trial Judge erred in refusing to affirm defendant's fifth request for conclusion of law, which request and the answer thereto were as follows:

" '5. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Pennsylvania Railroad and judgment is therefore entered in favor of said defendant and against the said plaintiff.'

"Answer. 'Resused' " (page 128a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

24. The learned Court below erred in dismissing defendant's twenty-fourth Exception, said Exception and the Order dismissing the same being as follows:

"24. The learned trial Judge erred in finding as a fact the following:

" '1. That the defendants on March 1, 1920 confiscated 80 cars of coal aggregating 4,577.55 net tons, the property of the plaintiff' " (page 129a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a).

25. The learned Court below erred in dismissing defendant's twenty-fifth Exception, said Exception and the Order dismissing the same being as follows:

"25. The learned trial Judge erred in finding as a fact the following:

" '2. The cost of said coal to the plaintiff at Philadelphia was $22,875.22 and the market value at the time it was converted by the defendant, to wit, March 1, 1920 was (delivered at Philadelphia) $6.44 a net ton or $29,479.42' " (page 129a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

26. The learned Court below erred in dismissing defendant's twenty-sixth Exception, said Exception and the Order dismissing the same being as follows:

"26. The learned trial Judge erred in finding as an additional conclusion of law the following:

" '1. That on the facts found the defendant is liable to pay to the plaintiff the market value of the coal converted, i. e., $29,479.42 less

the amount already paid, i. e., $22,875.22, with interest on the balance from March 1, 1920' " (page 129a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

27. The learned Court below erred in entering judgment in favor of plaintiff and against defendant, as follows:

"Dec. 18, 1923, Judgment on findings in favor of plaintiff.
"Eo die, Damages assessed at $8,109.95" (page 2a).

Charles Myers, John Hampton Barnes, Attorneys for Appellant.

[File endorsement omitted.]

IN SUPREME COURT OF PENNSYLVANIA

Nos. 33 and 34

[Title omitted]

OPINION—Filed July 8, 1924

KEPHART, J.:

Shortly after war was declared with Germany, Congress passed the Fuel and Food Control Act. Under it the President appointed an administrator with full authority to make such rules, regulations, prices, apportionment, etc., that would secure an adequate supply, equitable distribution and facilitate the movement of food, fuel, etc. Under this delegation, many orders designed to promote the efficient conduct of the war were issued, and enforced. Before the treaty of peace was adopted and signed, or in January and February, 1919, some time after the armistice and the cessation of hostilities, the President suspended all orders relating to the control of fuel except some unnecessary here to discuss. The Fuel Administrator went out of office the following summer, and with his departure its fiscal and other affairs were closed. In autumn a nation-wide coal strike was threatened, and, on October 30, 1919, an Executive Order (Exhibit No. 12) was issued, wherein it is stated that " it is necessary to restore and maintain during the war certain rules, regulations, orders and proclamations." The President then revoked and annulled the "orders of January 31, 1919, and February 20, 1919, to the extent necessary to restore all of the said rules, regulations, orders and proclamations therein suspended concerning" fixing or regulating prices; and authority was given that " the Fuel Administrator shall, as occasion arises, restore, change or make such rules or regulations relating to the production, sale, shipment, distribution, apportionment, storage or use of bituminous and lignite coal as in his judgment may be necessary."

This was followed by an order of October 30, by the Fuel Administrator, wherein "the Director General of Railroads and his representatives [were designated] to carry into effect the order of January 14, 1918, and to make such diversions of coal which the railroads under his direction may as common carriers have in their possession, as may be necessary in the present emergency to provide for the requirements of the country in the order of priority set forth in" a former preference order. This transfer of authority was made under the Overman Act (Act May 20, 1918, c. 78, 40 St. L., 556).

A further executive order was issued November 5th, in substance much the same as the preceding one of October 30th, and another by the Fuel Administrator on November 12th, eliminating, insofar as the fixing of prices was concerned, "bona fide contracts enforceable at law entered into prior to October 30, 1919."

Acting under the authority thus transferred, the Director General seized many cars of coal consigned to plaintiff on prior contracts for which plaintiff was paying the government price; it was used for railroad purposes. Plaintiff was thus deprived of fuel necessary for its commitments, and, to relieve the storage, went into the open market and purchased at increased prices the amount necessary to supply its demand. It sued the Director General for damages as for an unlawful conversion of the coal consigned, and was awarded the full amount of its claim by the court below, trying the case without a jury. This appeal followed.

Aside from wartime regulations, the defendant would be bound to pay plaintiff as damages the market value of the coal converted. Hill v. Canfield, 56 Pa., 454, 459; 26 R. C. L., 1148; Norfolk & Western Ry. Co. v. Fort Dearborn Coal & Export Co., 292 Fed., 78; National City Bank of New York, v. U. S., 275 Fed., 855, affirmed 281 Fed., 754; C. G. Blake Co. v. U. S., 275 Fed., 861, affirmed 279 Fed., 71; Muser v. Magone, 155 U. S., 240.

We have here presented, then, the questions whether the orders fixing prices and diversion of coal were lawful or in excess of the executive authority, and if valid, was the consignee not entitled to just compensation for the loss sustained; and finally, was the Director General the proper defendant? In ascertaining whether the orders were illegal or exceeded executive authority, not only must the act in its entirety be considered, but also all relevant facts of record, and those of which judicial knowledge may be taken.

Price-fixing under proper conditions, like rate-making, is exclusively a legislative matter. To sustain acts in relation thereto an empowering statute must be pointed out. As yet it has not been determined there exists in the government an unlimited right to fix prices for all commodities, including the necessities of life. It has been held, under the police power of the several states that the right exists by legislation or (the recognized substitute) by a delegation of legislative power to a commission to fix the rates of public service companies to be charged for their service or commodity. The right to fix similar rates for those companies engaged in interstate commerce has been held to exist under the Federal Constitution.

During the war the authority to fix rates and provide exclusive regulation was extended to all commodities. "A state of war, however, may affect with a public interest articles, which under normal conditions are free to commerce in its usual channels, and thus render subject to governmental regulation that which otherwise would be unobstructed and unhindered by the law." Lajoie v. Milliken, 242 Mass., 508, 136 N. E., 419, 433. The right was based on what has been generally termed implied "war power." The exercise of this right or power has as its foundation the national security and defense; it is of such paramount importance alike to the country and its citizens, and of such drastic consequences, it seems imperative it must not be carried beyond what is generally comprehended by the term, or into conditions of life not justifying its existence. When lawfully brought into action by Congress, it must be kept within its own limitations. It should not exist after the circumstances are ended through which it was brought into life, namely, war or public insurrection actually existing. Until the Supreme Court of the United States determines otherwise, the act in question must be held ineffective, after the cessation of hostilities in its broadest sense, freed from technical construction by acts of Congress, having a tendency to continue on paper only hostile conditions into a time of Peace. With no reason of national import to justify its exercise, and without constitutional authority to sustain it, courts will not uphold acts done either under an abortive power or one equally as bad,—a power once good but inert through its own limitation.

The reason is obvious; to hold otherwise, the supreme sovereign at any time may enter and dictate the most ordinary affairs of life, as may an absolute monarch. Up to the present time at least, the toleration of this in peace time is unthinkable under our system of government. We do not assert, even in times of peace as contrasted with a state of war, that domestic conditions may not assume such serious import as to be akin to an insurrection, though force of arms be not used; when such condition arises Congress should publicly declare it; executive officers should not be forced to use legislation intended for other purposes to justify their acts. Apportionment of commodities or diversion of fuel stands in the same position in this respect as fixing prices.

The Food and Fuel Act, through its many sections, uses various terms to express the dominant purpose. But it is well summed up in section 25, under which the Director General assumed his authority. So much of it as is necessary for our consideration reads, "The President of the United States * * * is hereby authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, * * * to regulate the method of distribution, apportionment, (etc.); * * * said authority and power may be exercised by him * * * during the war or for such part of said time as in his judgment may be necessary." Act of Aug. 10, 1917, c. 53, 40 St. L., 276, 284.

It must be conceded every reasonable intendment must be in favor of the validity of the order; peace not being actually declared; any matter directly or indirectly involved in the prosecution of the war within the scope of the act comes under the authority delegated by Congress; and, where this appears, the decision of the President should be final. Hamilton v. Kentucky Distilleries & Warehouse Co., 251, U. S., 146. Nor should the reasons for his action be open to question when orders are made for the efficient prosecution of a war, "a thing actually existing," it must be assumed his acts were in good faith, from a proper motive and for the purpose named. But it is equally clear, where the circumstances which gave rise to the power no longer exist, or where the executive acts outside of the scope of his authority, the rights of citizens must depend on things as they are, and not on the protestations of administrative officers. Yick Wo v. Hopkins, 118 U. S., 356, 373; Ex Parte Virginia, 100 U. S., 339. Even the "War Power" of Congress is subject to applicable constitutional limitations. Hamilton v. Kentucky Distilleries & Warehouse Co., supra.

It has been held that, in war time, the courts will not accept the conclusion of military authorities, duly approved by the President, as to military necessity for exercising war powers, Ex Parte Milligan, 4 Wall. 2. And, if this is still the law, it would seem acts done a year or so after the close of hostilities, before peace is actually signed, would scarcely be considered a military necessity, unless it was plainly apparent they were a direct result of such necessity.

Under section 25 of the act, the restoration order of October 30th, could be issued only if a state of war continued, and the order was promulgated as a war measure. It must be conceded that more than a year before it was issued Germany was hopelessly defeated, her armies disbanded, her fleet surrendered or destroyed, and much of her physical properties, including vast quantities of war material, turned over to the victorious countries. Shortly after the armistice, our own army was disbanded, and when the restoration order was issued our economic life was on a peace basis, with the usual troubles incident thereto. Meanwhile, the President in person had signed a treaty of peace with Germany at Versailles. He had, in vetoing the Volstead Act, publicly asserted, "Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal." 58 Congressional Record, 7607, October 27, 1919.

After February, 1919, as stated above, the Fuel Administrator voluntarily relinquished his office, and between that date and October 30th no phase of the war, qua war, existed. It is not pretended that the basis of the President's order of the latter date was a finding or judgment that it was necessary for the efficient prosecution of the war, nor is any effort made in this record to show such was the case, or that it was directly or indirectly a natural or normal consequence of the war. History shows it was not, and the records are all to the contrary.

In the report of February 23, 1920, to the President of the Senate, the Director General states that the Executive Order of October 30th was issued "in anticipation of a strike of bituminous coal miners, expected to commence November 1, 1919," and because the production of coal fell off, diversions of coal were necessary.

On this statement of the case it must be apparent that the underlying purposes for which the act was passed were successfully accomplished, and long since a matter of history; it is just as apparent no legal order such as the ones in question could be founded on that act. The restoration of the order was not in any way connected with the war, and, as it affected but a part of that community, it falls into that class of private life which the government has not as yet attempted to regulate.

Even if the Versailles treaty had not been approved by the Senate, or that one had not been lawfully executed by the two governments, what has been said above is ample to show the restoration order of October 30th was not a war measure under the act, and consequently must be held to be invalid. The purpose for which the act was passed no longer existed, and an order based on the "present emergency," the anticipation of a coal strike, could hardly be considered as being related to the "efficient prosecution of the war." Nor would any official statement make it so, if one had been made.

That such is the judicial trend of thought is evidenced from a consideration of cases involving the United States Shipping Board, and the allied agencies of government.

The case of Hamilton v. Kentucky Distilleries & Warehouse Co., supra, involving the right of the United States to conserve its manpower and increase efficiency of production by forbidding sale or removal of liquors from bonded warehouses for beverage purposes, does not control the instant case. As stated by an eminent jurist, "It is clear that there is a broad distinction between the rights of liquor dealers and constitutional rights of the one dealing in coal, a necessary commodity, and a business which has nothing of that evil tendency of the manufacture and sale of liquor. Liquor dealers have constant notice that their business is subject to drastic regulation and restraint in legislative discretion, and that the incidental losses by reason thereof, however heavy, must be borne by those risking their capital in it. The distinction between the two kinds of business as clearly made in Mugler v. Kansas, 123 U. S. 623, and Stone v. Mississippi, 101 U. S. 814.

It follows that fixing prices for coal and regulating its distribution, if valid, is a field of policing in which much greater care must be exercised by the legislative power to see that it does not constitute a sacrifice of the property whose price is fixed or whose disposition is regulated than in restricting the sale of liquor."

The cases relied on by the appellant, Ford v. U. S. 281, Fed. 298, reversed 44 Sup. Ct. Rep. 300, and Lajoie v. Milliken, supra, concern the conduct of the fuel administration during and not after the war.

Although no case within our knowledge has directly passed on the questions now being considered, some come close to the issue;

all support our conclusion, Dexter & Carpenter v. Davis, 281 Fed. 385; U. S. v. Cohen Grocery Co., 255 U. S. 81; U. S. v. New River Collieries, 262 U. S. 341, 342. In the last named case it might appear some of the coal was moved during the effective period of the regulations, but as a matter of fact such was not the case.

If we should be in error in holding the regulations were without authority in law, and the defendant must pay the market value in accordance with the legal principal involved, defendant's situation is not improved, as, by the Fifth Amendment to the Federal Constitution, just compensation must be made to the plaintiff in the same measure of damages.

While the authority of the President, under section 25, may be exercised "during the war or such part of the said time as in his judgment may be necessary," this does not have the effect of granting any greater power than is embodied in the previous part of the section; it has relation solely to a state of actual war,—a condition then existing. It is urged that Hamilton v. Kentucky Distilleries Co., supra, held "Congress is given certain powers in war time which even the Fifth Amendment does not limit or restrict." The case asserts no such proposition. Mr. Justice Brandeis says (p. 156) that "the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power," and within the scope of its legal operation this of course is true. "But the exercise of the war powers is (except in respect to property destroyed by military operations, United States v. Pacific Railroad, 120 U. S. 227, 239) subject to the Fifth Amendment. United States v. Russell, 13 Wall. 623, 627." Just compensation must be made for private property taken for war purposes. This is not only well settled but based on sound morals, U. S. v. Cohen Grocery Co., supra.

The owner of property taken under the Lever Act is "entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken: Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299 and cases cited. The ascertainment of compensation is a judicial function," U. S. v. New River Collieries, supra, 343, 344.

To declare what the compensation for plaintiff's coal should be, and to prescribe rules for taking it, regardless of the owner's loss, would be to take this property out of the protection of the Fifth Amendment. "The government, as a war measure under the exercise of governmental powers, may fix prices, either directly or by governmental regulations necessarily reducing the prices; but this does not authorize it to acquire the property in invitum at such reduced prices." National City Bank, v. U. S., Supra. The plaintiff was entitled to judicial ascertainment of his damages. This he secured through the action of the court below. The compensation was fixed at the amount of the judgment, and unless the action should have been against the United States, the judgment should be affirmed.

The court below, on this latter question, states, "The defendant however insists that the suit should then have been brought against the United States, eo nomine, and not against the Director General of

Railroads. And so it should, if Congress had not otherwise directed by [sec. 206 of the] Act of February 28th, 1920 [c. 91, 41 St. L. 456, 461], which provides that: 'Actions at law * * * based on causes of action arising out of the * * * operations by the President of the railroad * * * of any carrier [under the provisions of the Federal Control Act] * * * of such character as prior to federal control could have been brought against such carrier, may, after the termination of federal control, be brought against an agent designated by the President for such purpose.' "

The action is based on Section 206 of the Transportation Act, and it must be held to be one that arises out of the possession, use or operation by the President of the railroads involved during federal control.

While some stress is laid upon the dual capacity of the Director General as head of the Fuel Administration, and at the same time Director General, yet cutting through the screen of titles and authority, the fact is that, under the order of the Director General coal was seized and used by the defendant. The companies received the benefit of it, and now seek to pay only the price fixed by the government, and refuse compensation to the plaintiff for its undoubted loss sustained by the taking. This they cannot do. Conversion must be followed by just compensation. The party benefited was the defendant in this suit; the director general is properly named as the defendant. In the suit against him while operating the Philadelphia and Reading Railway Company, he expressly admits he is properly named as defendant, and in the Pennsylvania Railroad Company Appeal he expressly admits that he diverted the coal; this necessarily carried with it an implied admission that he is the proper defendant.

Other points of minor importance, not discussed in this opinion or in the briefs, raised in the assignments of error, are immaterial. All the assignments are overruled and the judgment of the court below is affirmed.

[File endorsement omitted.]

BOND ON WRIT OF ERROR FOR $250—Approved and filed; omitted in printing

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BOND ON WRIT OF ERROR FOR $250—Approved and filed; omitted in printing

IN SUPREME COURT OF PENNSYLVANIA

WRIT OF ERROR—Filed Sept. 23, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James C. Davis, Director General of Railroads, as Agent of the President, operating Philadelphia & Reading Railway, Plaintiff in Error, and George B. Newton Coal Company, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said James C. Davis, Director General of Railroads, as Agent of the President, operating Philadelphia & Reading Railway, Plaintiff in Error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 23rd day of September, in the year of our Lord one thousand nine hundred and twenty-four.

George Brodbeck, Clerk of the United States Dist. Court, E. D. of Pennsylvania. (Seal of the District Court of the United States, E. D. Penna.)

Allowed by Robt. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

[File endorsement omitted.]

IN SUPREME COURT OF PENNSYLVANIA

WRIT OF ERROR—Filed Sept. 23, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James C. Davis, Director General of Railroads, Agent, Plaintiff in Error, and George B. Newton Coal Company, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said James C. Davis, Director General of Railroads, Agent, Plaintiff in Error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 23rd day of September, in the year of our Lord one thousand nine hundred and twenty-four.

George Brodbeck, Clerk of the United States Dist. Court, E. D. of Pennsylvania. (Seal of the District Court of the United States, E. D. Penna.)

Allowed by Robt. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

[File endorsement omitted.]

CITATION—In usual form, showing service on Allen S. Olmsted, 2nd; filed Sept. 30, 1924; omitted in printing

I hereby accept service of the within citation on behalf of George B. Newton Coal Company, defendant in error, within named.
Allen S. Olmsted, 2nd, Counsel for Defendant in Error.

CITATION—In usual form, showing service on Allen S. Olmsted, 2nd; filed Sept. 30, 1924; omitted in printing

I hereby accept service of the within citation on behalf of George B. Newton Coal Company, defendant in error, within named.
Allen S. Olmsted, 2nd, Counsel for Defendant in Error.

IN SUPREME COURT OF PENNSYLVANIA

No. 33

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Oct. 21, 1924

And now comes James C. Davis, Director General of Railroads, operating Philadelphia & Reading Railway, petitioner and plaintiff-in-error, by his counsel, and in connection with his petition for a writ of error files the following assignments of error upon which he will rely upon the prosecution of the appeal in the above entitled cause from the judgment entered by the Supreme Court of Pennsylvania on the 8th day of July A. D. 1924; and avers that the Supreme Court of Pennsylvania, the learned Court below, erred as in these Assignments of Error set forth:

1. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 1 filed in that Court, which was:

1. The learned Court below erred in dismissing defendant's first Exception, said Exception and the Order dismissing the same being as follows:

"1. The learned trial Judge erred in affirming plaintiff's 13th request for finding of fact, which request and the answer thereto were as follows:

"'13. The orders of October 30, and October 31 were issued to meet the emergency caused by the nation wide coal strike called to begin November 1, 1919.'
"Answer.—'Affirmed'" (page 113a).

December 12th, 1923, Exceptions dismissed (page 1a).

Per CURIAM:

"The trial Judge's discussion of the case fully covers all questions raised by defendant's Exceptions to his findings. His conclusions therein were reached by reasoning which we approve as correct. Nothing can with profit be added to what he has said. His findings of law and fact are adopted in toto" (page 129a).

2. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 2 filed in that Court, which was:

2. The learned Court below erred in dismissing defendant's second Exception, said Exception and the Order dismissing the same being as follows:

"2. The learned trial Judge erred in affirming plaintiff's 19th request for finding of fact, which request and the answer thereto were as follows:

" '19. Coal was being sold and delivered on contract at the Government price at the time this coal was seized, but it was impossible to buy coal not covered by contract at such a price. The only coal to be bought in the open market was for sale only at prices greatly in excess of the Government price.'

"Answer.—'Affirmed' " (page 113a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

3. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 3 filed in that Court, which was:

3. The learned Court below erred in dismissing defendant's third Exception, said Exception and the Order dismissing the same being as follows:

"3. The learned trial Judge erred in affirming plaintiff's 20th request for finding of fact, which request and the answer thereto were as follows:

" '20. The market price of coal, that is the price at which coal was actually sold by sellers to buyers who did not have long term contracts for the coal, rapidly rose after the beginning of 1919. In the spring of 1919 it rose from $6 to $8 per ton at the mines and in the early fall it sold as high as $12.50 or $15 per net ton.'

"Answer.—'Affirmed' " (page 114a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

4. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 4 filed in that Court, which was:

4. The learned Court below erred in dismissing defendant's fourth Exception, said Exception and the Order dismissing the same being as follows:

"4. The learned trial Judge erred in affirming plaintiff's 21st request for finding of fact, which request and the answer thereto were as follows:

" '21. At the time this coal was seized by the defendant and at the time it should have been delivered to the plaintiff in the normal course of transportation, the market price at Philadelphia was $6.44 per net ton for coal of a grade inferior to that taken by the defendant. It was impossible at any price at that time to get coal in Philadelphia of the grade seized by the defendant.'
"Answer.—'Affirmed' " (page 114a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

5. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 5 filed in that Court, which was:

5. The learned Court below erred in dismissing defendant's fifth Exception, said Exception and the Order dismissing the same being as follows:

"5. The learned trial Judge erred in affirming plaintiff's 22nd request for finding of fact, which request and the answer thereto were as follows:

" '22. The plaintiff was damaged by the defendant's action in seizing the coal in the amount of the difference between the cost of the coal seized by the defendant and its value at $6.44 per net ton, plus interest thereon from March 1, 1920, to the date of judgment. This amounted to $6,604.20, plus interest in the case of the coal seized on the Pennsylvania Railroad, and $2,757.73 plus interest in the case of the coal seized on the Philadelphia and Reading Railway.'
"Answer.—'Affirmed' " (page 114a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

6. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 6 filed in that Court, which was:

6. The learned Court below erred in dismissing defendant's sixth Exception, said Exception and the Order dismissing the same being as follows:

"6. The learned trial Judge erred in affirming plaintiff's first request for conclusion of law, which request and the answer thereto were as follows:

" '1. The 80 cars of coal shipped to the plaintiff and seized on the Pennsylvania Railroad and the 33 cars of coal shipped to the plaintiff and seized on the Philadelphia & Reading Railway were the property of the plaintiff at the time they were seized.'
"Answer.—'Affirmed' " (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

7. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 7 filed in that Court, which was:

7. The learned Court below erred in dismissing defendant's seventh Exception, said Exception and the Order dismissing the same being as follows:

"7. The learned trial Judge erred in affirming plaintiffs second request for conclusion of law, which request and the answer thereto were as follows:

"'2. The seizure of the coal was an unlawful conversion.'
"Answer.—'Affirmed'" (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

8. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 8 filed in that Court, which was:

8. The learned Court below erred in dismissing defendant's eighth Exception, said Exception and the Order dismissing the same being as follows:

"8. The learned trial Judge erred in affirming plaintiff's third request for conclusion of law, which request and the answer thereto were as follows:

"'3. The plaintiff is entitled to recover as damages the market value of the coal at the time and at the place when it should have been delivered to the plaintiff minus freight charges and war tax and the amount which the defendant has paid to the shippers of the coal.'
"Answer.—'Affirmed'" (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

9. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 9 filed in that Court, which was:

9. The learned Court below erred in dismissing defendant's ninth Exception, said Exception and the Order dismissing the same being as follows:

"9. The learned trial Judge erred in affirming plaintiff's fourth request for conclusion of law, which request and the answer thereto were as follows:

"'4. In determining the market value of the coal seized by the Director General of Railroads, the Court cannot take into consideration the prices fixed or the other regulations issued by the Director General himself.'
"Answer. 'Affirmed'" (page 115a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

10. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 10 filed in that Court, which was:

10. The learned Court below erred in dismissing defendant's tenth Exception, said Exception and the Order dismissing the same being as follows:

"10. The learned trial Judge erred in affirming plaintiff's fifth request for conclusion of law, which request and the answer thereto were as follows:

" '5. The plaintiff is entitled to recover from the defendant the amount it had to pay to replace the coal seized by the defendant minus the amounts which it would have had to pay as contract purchase price, freight charges and war tax on the coal seized.'
"Answer. 'Affirmed' " (page 116a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

11. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 11 filed in that Court, which was:

11. The learned Court below erred in dismissing defendant's eleventh Exception, said Exception and the Order dismissing the same being as follows:

"11. The learned trial Judge erred in affirming plaintiff's tenth request for conclusion of law, which request and the answer thereto were as follows:

" '10. The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit.'
"Answer. 'Affirmed' " (page 116a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

12. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 12 filed in that Court, which was:

12. The learned Court below erred in dismissing defendant's twelfth Exception, said Exception and the Order dismissing the same being as follows:

"12. The learned trial Judge erred in affirming plaintiff's twelfth request for conclusion of law, which request and the answer thereto were as follows:

" '12. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the Presi-

dent operating the Philadelphia & Reading Railway in the sum of $2,757.73 with interest from March 1, 1920, to the date of judgment at 6 per cent per annum.'

"Answer. 'Affirmed' " (page 116a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

13. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 13 filed in that Court, which was:

13. The learned Court below erred in dismissing defendant's thirteenth Exception, said Exception and the Order dismissing the same being as follows:

"13. The learned trial Judge erred in refusing to affirm defendant's 2nd request for finding of fact, which request and the answer thereto were as follows:

" '2. Under plaintiff's oral contract with The Berwind White Coal Mining Company, the latter only agreed to ship to plaintiff as much coal as it could, so plaintiff was not in a position to rely on the Berwind White Coal Mining Company as the source of its supply of coal.'

"Answer. 'Refused. This is immaterial since the coal in suit was actually delivered' " (page 117a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

14. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 14 filed in that Court, which was:

14. The learned Court below erred in dismissing defendant's fourteenth Exception, said Exception and the Order dismissing the same being as follows:

"14. The learned Judge erred in refusing to affirm defendant's 3rd request for finding of fact, which request and the answer thereto were as follows:

" '3. Plaintiff's contract for the purchase of coal from Maderia, Hill & Co., which was made prior to February, 1920, contained the following provision:

"It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administrator, dated December 24th, 1917, and effective December 29th, 1917, all of the terms and provisions of which are hereby incorporated herein, with the same force and effect as if the same were set forth at length." '

"Answer. 'Refused. See Answer to No. 2" (page 117a).

December 12th, 1923, Exceptions dismissed (page 1a). (See Order, page 129a).

15. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 15 filed in that Court, which was:

15. The learned Court below erred in dismissing defendant's fifteenth Exception, said Exception and the Order dismissing the same being as follows:

"15. The learned Trial Judge erred in refusing to affirm without qualification defendant's 4th request for finding of fact, which request and the answer thereto were as follows:

" '4. Plaintiff's contract for the purchase of coal from Whitney & Kemmerer contained a provision that the contract was subject to any rules and regulations which might be made by the United States Fuel Administration.

"Answer. 'Affirmed. The contract contained such a clause but the only regulation referred to by the defendant was that of July 17, 1919, which applied to "coal deliverable" under a contract, provided for "requisition prior to actual receipt." This regulation had no application to the coal in suit which was delivered to plaintiff f. o. b. mines.' " (Page 117a.)

December 12th, 1923, Exceptions dismissed (page 1a). (See Order, page 129a.)

16. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 16 filed in that Court, which was:

16. The learned Court below erred in dismissing defendant's sixteenth Exception, said Exception and the Order dismissing the same being as follows:

"16. The learned Trial Judge erred in refusing to affirm without qualification defendant's 5th request for finding of fact, which request and the answer thereto were as follows:

" '5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:

" ' "This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as if set forth at length." '

"Answer. 'Affirmed.' " See answer to No. 4 (page 118a).

December 12th, 1923, Exceptions dismissed (page 1a). (See Order, page 129a.)

17. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 17 filed in that Court, which was:

17. The learned Court below erred in dismissing defendant's seventeenth Exception, said Exception and the Order dismissing the same being as follows:

"17. The learned Trial Judge erred in refusing to affirm without qualification defendant's 6th request for finding of fact, which request and the answer thereto were as follows:

" '6. Plaintiff's contract for the purchase of coal from Commercial Coal Mining Company contained the following provision:

" ' "That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919." '

"Answer. 'Affirmed.' " See answer to No. 4 (page 118a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

18. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 18 filed in that Court, which was:

18. The learned Court below erred in dismissing defendant's eighteenth Exception, said Exception and the Order dismissing the same being as follows:

"18. The learned Trial Judge erred in refusing to affirm defendant's 7th request for finding of fact, which request and the answer thereto were as follows:

" '7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months in 1920.'

"Answer. 'Refused as immaterial' " (page 119a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

19. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 19 filed in that Court, which was:

19. The learned Court below erred in dismissing defendant's nineteenth Exception, said Exception and the Order dismissing the same being as follows:

"19. The learned Trial Judge erred in refusing to affirm defendant's 8th request for finding of fact, which request and the answer thereto were as follows:

" '8. During the period from November 1st, 1919, to March, 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration and coal was so diverted and settlement therefor was made by plaintiff with the

shippers of such coal at the prices established by the United States Fuel Administration.'

"Answer. 'Refused as immaterial' " (page 119a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

20. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 20 filed in that Court, which was:

20. The learned Court below erred in dismissing defendant's twentieth Exception, said Exception and the Order dismissing the same being as follows:

"20. The learned Trial Judge erred in refusing to affirm defendant's first request for conclusion of law, which request and the answer thereto were as follows:

" '1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforcible during the period covered by this suit."

"Answer. 'Refused' " (page 119a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

21. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 21 filed in that Court, which was:

21. The learned Court below erred in dismissing defendant's twenty-first Exception, said Exception and the Order dismissing the same being as follows:

"21. The learned Trial Judge erred in refusing to affirm defendant's third request for conclusion of law, which request and the answer thereto were as follows:

" '3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919, to March 1st, 1920, making requests for diversion of coal to it and settling therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the price fixed by such regulations for coal consigned to it which was diverted to other parties.'

"Answer. 'Refused' " (page 120a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

22. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 22 filed in that Court, which was:

22. The learned Court below erred in dismissing defendant's twenty-second Exception, said Exception and the Order dismissing the same being as follows:

"22. The learned Trial Judge erred in refusing to affirm defendant's fourth request for conclusion of law, which request and the answer thereto were as follows:

" '4. There is no liability on the part of the defendants named in these actions to plaintiff as plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276.'

"Answer. 'Refused' " (page 120a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

23. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 23 filed in that Court, which was:

23. The learned Court below erred in dismissing defendant's twenty-third Exception, said Exception and the Order dismissing the same being as follows:

"23. The learned Trial Judge erred in refusing to affrm defendant's sixth request for conclusion of law, which request and the answer thereto were as follows:

" '6. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Philadelphia and Reading Railway and judgment is therefore entered in favor of said defendant and against the said plaintiff.'

"Answer. 'Refused' " (page 120a).

December 12th, 1923.—Exceptions dismissed (page 1a). (See Order, page 129a.)

24. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 24 filed in that Court, which was:

24. The learned Court below erred in entering judgment in favor of plaintiff and against defendant, as follows:

"Dec. 18, 1923, Judgment on findings in favor of plaintiff.
"Eo die, Damages assessed at $3,386.49" (page 1a).

25. The Supreme Court of Pennsylvania erred in affirming the judgment of Court of Common Pleas No. 4, of Philadelphia County, in favor of George B. Newton Coal Company and against this plaintiff-in-error in the sum of $3,386.49.

By reason whereof this petitioner and plaintiff-in-error prays that the judgment of the Supreme Court of Pennsylvania may be reversed.

Wm. Clarke Mason, Counsel for Plaintiff-in-Error.

[File endorsement omitted.]

IN SUPREME COURT OF PENNSYLVANIA

No. 34

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Oct. 21, 1924

And now comes James C. Davis, Director General of Railroads, operating Pennsylvania Railroad, petitioner and plaintiff-in-error, by his counsel, and in connection with his petition for a writ of error files the following assignments of error upon which he will rely upon the prosecution of the appeal in the above entitled cause from the judgment entered by the Supreme Court of Pennsylvania on the 8th day of July A. D. 1924; and avers that the Supreme Court of Pennsylvania, the learned Court below, erred as in these assignments of error set forth:

1. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 1 filed in that Court, which was:

1. The learned Court below erred in dismissing defendant's first Exception, said Exception and the Order dismissing the same being as follows:

"1. The learned Trial Judge erred in affirming plaintiff's 13th request for finding of fact, which request and the answer thereto were as follows:

" 'The orders of October 30, and October 31 were issued to meet the emergency caused by the nation wide coal strike called to begin November 1, 1919.'
"Answer.—'Affirmed' " (page 121a).

December 12th, 1923—Defendant's exception dismissed (page 2a). Per Curiam:

"This case was tried jointly with a similar case at the suit of the same plaintiff against the same defendant with respect to his operation of the Philadelphia & Reading Railway. The Trial Judge's discussion of both cases (filed to the term and number of the latter case) fully covers all questions raised by defendants' Exceptions herein to his findings. His conclusions therein were reached by reasoning which we approve as correct. His findings of law and fact are adopted in toto" (page 130a).

2. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 2 filed in that Court, which was:

2. The learned Court below erred in dismissing defendant's second Exception, said Exception and the Order dismissing the same being as follows:

"2. The learned Trial Judge erred in affirming plaintiff's 19th request for finding of fact, which request and the answer thereto were as follows:

" '19. Coal was being sold and delivered on contract at the Government price at the time this coal was seized, but it was impossible to buy coal not covered by contract at such a price. The only coal to be bought in the open market was for sale only at prices greatly in excess of the Government price.'

"Answer.—'Affirmed' " (page 121a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

3. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 3 filed in that Court, which was:

3. The learned Court below erred in dismissing defendant's third Exception, said Exception and the Order dismissing the same being as follows:

"3. The learned Trial Judge erred in affirming plaintiff's 20th request for finding of fact, which request and the answer thereto were as follows:

" '20. The market price of coal, that is the price at which coal was actually sold by sellers to buyers who did not have long term contracts for the coal, rapidly rose after the beginning of 1919. In the spring of 1919 it rose from $6 to $8 per ton at the mines and in the early fall it sold as high as $12.50 or $15 per net ton.'

"Answer.—'Affirmed' " (page 122a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

4. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 4 filed in that Court, which was:

4. The learned Court below erred in dismissing defendant's fourth Exception, said Exception and the Order dismissing the same being as follows:

"4. The learned Trial Judge erred in affirming plaintiff's 21st request for finding of fact, which request and the answer thereto were as follows:

" '21. At the time this coal was seized by the defendant and at the time it should have been delivered to the plaintiff in the normal course of transportation, the market price at Philadelphia was $6.44 per net ton for coal of a grade inferior to that taken by the defendant. It was impossible at any price at that time to get coal in Philadelphia of the grade seized by the defendant.'

"Answer.—'Affirmed' " (page 122a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

5. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 5 filed in that Court, which was:

5. The learned Court below erred in dismissing defendant's fifth Exception, said Exception and the Order dismissing the same being as follows:

"5. The learned Trial Judge erred in affirming plaintiff's 22nd request for finding of fact, which request and the answer thereto were as follows:

" '2. The plaintiff was damaged by the defendant's action in seizing the coal in the amount of the difference between the cost of the coal seized by the defendant and its value at $5.44 per net ton, plus interest thereon from March 1, 1920 to the date of judgment. This amounted to $6,604.20, plus interest in the case of the coal seized on the Pennsylvania Railroad, and $2,757.73 plus interest in the case of the coal seized on the Philadelphia and Reading Railway.'

"Answer.—'Affirmed' " (page 122a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

6. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 6 filed in that Court, which was:

6. The learned Court below erred in dismissing defendant's sixth Exception, said Exception and the Order dismissing the same being as follows:

"6. The learned Trial Judge erred in affirming plaintiff's first request for conclusion of law, which request and the answer thereto were as follows:

" '1. The 80 cars of coal shipped to the plaintiff and seized on the Pennsylvania Railroad and the 33 cars of coal shipped to the plaintiff and seized on the Philadelphia & Reading Railway were the property of the plaintiff at the time they were seized.'

"Answer.—'Affirmed' " (page 123a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

7. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 7 filed in that Court, which was:

7. The learned Court below erred in dismissing defendant's seventh Exception, said Exception and the Order dismissing the same being as follows:

"7. The learned Trial Judge erred in affirming plaintiff's second request for conclusion of law, which request and the answer thereto were as follows:

" '2. The seizure of the coal was an unlawful conversion.'
"Answer.—'Affirmed' " (page 123a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

8. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 8 filed in that Court, which was:

8. The learned Court below erred in dismissing defendant's eighth Exception, said Exception and the Order dismissing the same being as follows:

"8. The learned Trial Judge erred in affirming plaintiff's third request for conclusion of law, which request and the answer thereto were as follows:

" '3. The plaintiff is entitled to recover as damages the market value of the coal at the time and at the place when it should have been delivered to the plaintiff minus freight charges and war tax and the amount which the defendant has paid to the shippers of the coal.'
"Answer.—'Affirmed' " (page 123a).

December 12th, 1923—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

9. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 9 filed in that Court, which was:

9. The learned Court below erred in dismissing defendant's ninth Exception, said Exception and the Order dismissing the same being as follows:—

"9. The learned Trial Judge erred in affirming plaintiff's fourth request for conclusion of law, which request and the answer thereto were as follows:

" '4. In determining the market value of the coal seized by the Director General of Railroads, the court cannot take into consideration the prices fixed or the other regulations issued by the Director General himself.'
"Answer.—'Affirmed' " (page 123a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

10. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 10 filed in that Court, which was:

10. The learned Court below erred in dismissing defendant's tenth Exception, said Exception and the Order dismissing the same being as follows:—

"10. The learned Trial Judge erred in affirming plaintiff's fifth request for conclusion of law, which request and the answer thereto were as follows:

"'5. The plaintiff is entitled to recover from the defendant the amount it had to pay to replace the coal seized by the defendant minus the amounts which it would have had to pay as contract purchase price, freight charges and war tax on the coal seized.'
"Answer.—'Affirmed'" (page 124a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

11. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 11 filed in that Court, which was:

11. The learned Court below erred in dismissing defendant's eleventh Exception, said Exception and the Order dismissing the same being as follows:—

"11. The learned Trial Judge erred in affirming plaintiff's tenth request for conclusion of law, which request and the answer thereto were as follows:

"'10. The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit.'
"Answer.—"Affirmed'" (page 124a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

12. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 12 filed in that Court, which was:

12. The learned Court below erred in dismissing defendant's twelfth Exception, said Exception and the Order dismissing the same being as follows:—

"12. The learned Trial Judge erred in affirming plaintiff's twelfth request for conclusion of law, which request and the answer thereto were as follows:

"'12. The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Philadelphia & Reading Railway in the sum of $2,757.73 with interest from March 1, 1920 to the date of judgment at 6% per annum.'
"Answer.—'Affirmed'" (page 124a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

13. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 13 filed in that Court, which was:

13. The learned Court below erred in dismissing defendant's thirteenth Exception, said Exception and the Order dismissing the same being as follows:—

"13. The learned Trial Judge erred in refusing to affirm defendant's 2nd request for finding of fact, which request and the answer thereto were as follows:

" '2. Under plaintiff's oral contract with The Berwind White Coal Mining Company, the latter only agreed to ship to plaintiff as much coal as it could, so plaintiff was not in a position to rely on the Berwind White Coal Mining Company as the source of its supply of coal.'

"Answer.—'Refused. This is immaterial since the coal in suit was actually delivered' " (page 125a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

14. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 14 filed in that Court, which was:

14. The learned Court below erred in dismissing defendant's fourteenth Exception, said Exception and the Order dismissing the same being as follows:—

"14. The learned Trial Judge erred in refusing to affirm defendant's 3rd request for finding of fact, which request and the answer thereto were as follows:

" '3. Plaintiff's contract for the purchase of coal from Madeira Hill & Co., which was made prior to February 1920, contained the following provision:

" ' "It is mutually understood and agreed that this contract is made subject to all the terms and provisions of the regulations of the United States Fuel Administrator, dated December 24th, 1917, and effective December 29th, 1917, all of the terms and provisions of which are hereby incorporated herein, with the same force and effect as if the same were set forth at length." '

"Answer.—Refused.' " See Answer to No. 2 (page 125a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

15. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 15 filed in that Court, which was:

15. The learned Court below erred in dismissing defendant's fifteenth Exception, said Exception and the Order dismissing the same being as follows:—

"15. The learned Trial Judge erred in refusing to affirm without qualification defendant's 4th request for finding of fact, which request and the answer thereto were as follows:

" '4. Plaintiff's contract for the purchase of coal from Whitney & Kemmerer contained a provision that the contract was subject to any rules and regulations which might be made by the United States Fuel Administration.'

"Answer.—'Affirmed. The contract contained such a clause but the only regulation referred to by the defendant was that of July 17, 1919 which applied to "coal deliverable" under a contract, provided for "requisition prior to actual receipt." This regulation had no application to the coal in suit which was delivered to plaintiff f. o. b. mines.'" (page 125a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

16. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 16 filed in that Court, which was:

16. The learned Court below erred in dismissing defendant's sixteenth Exception, said Exception and the Order dismissing the same being as follows:—

"16. The learned Trial Judge erred in refusing to affirm without qualification defendant's 5th request for finding of fact, which request and the answer thereto were as follows:

"'5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:

"'"This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as is set forth at length.'"

"Answer.—'Affirmed.'" See answer to No. 4 (page 126a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

17. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 17 filed in that Court, which was:

17. The learned Court below erred in dismissing defendant's seventeenth Exception, said Exception and the Order dismissing the same being as follows:

"17. The learned Trial Judge erred in refusing to affirm without qualification defendant's 6th request for finding of fact, which request and the answer thereto were as follows:

"'6. Plaintiff's contract for the purchase of coal from Commercial Coal Mining Company contained the following provision:

"'"That all conditions of this contract are subject to the regulations of the United States Fuel Administration effective January 18th, 1919.'"

"Answer. 'Affirmed.'" See answer to No. 4 (page 126a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

18. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 18 filed in that Court, which was:

18. The learned Court below erred in dismissing defendant's eighteenth Exception, said Exception and the Order dismissing the same being as follows:

"18. The learned Trial Judge erred in refusing to affirm defendant's 7th request for finding of fact, which request and the answer thereto were as follows:

" '7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months in 1920.'

"Answer. 'Refused as immaterial' " (page 127a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

19. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 19 filed in that Court, which was:

19. The learned Court below erred in dismissing defendant's nineteenth Exception, said Exception and the Order dismissing the same being as follows:

"19. The learned Trial Judge erred in refusing to affirm defendant's 8th request for finding of fact, which request and the answer thereto were as follows:

" '8. During the period from November 1st, 1919 to March 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration and coal was so diverted and settlement therefor was made by plaintiff with the shippers of such coal at the prices established by the United States Fuel Administration.'

"Answer. 'Refused as immaterial' " (page 127a).

December 12th, 1923.—Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

20. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 20 filed in that Court, which was:

20. The learned Court below erred in dismissing defendant's twentieth Exception, said Exception and the Order dismissing the same being as follows:

"20. The learned Trial Judge erred in refusing to affirm defendant's first request for conclusion of law, which request and the answer thereto were as follows:

" '1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforcible during the period covered by this suit.'
"Answer. 'Refused' " (page 127a).

December 12th, 1923, Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

21. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 21 filed in that Court, which was:

21. The learned Court below erred in dismissing defendant's twenty-first Exception, said Exception and the Order dismissing the same being as follows:

"21. The learned trial Judge erred in refusing to affirm defendant's third request for conclusion of law, which request and the Answer thereto were as follows:

" '3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919 to March 1st, 1920, making requests for diversion of coal to it and settling therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the price fixed by such regulations for coal consigned to it which was diverted to other parties.'
"Answer. 'Refused' " (page 128a).

December 12th, 1923, Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

22. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 22 filed in that Court, which was:

22. The learned Court below erred in dismissing defendant's twenty-second Exception, said Exception and the Order dismissing the same being as follows:

"22. The learned trial Judge erred in refusing to affirm defendant's fourth request for conclusion of law, which request and the answer thereto were as follows:

" '4. There is no liability on the part of the defendants named in these actions to plaintiff as plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276.'
"Answer. 'Refused' " (page 128a).

December 12th, 1923, Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

23. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 23 filed in that Court, which was:

23. The learned Court below erred in dismissing defendant's twenty-third Exception, said Exception and the Order dismissing the same being as follows:

"23. The learned trial Judge erred in refusing to affirm defendant's fifth request for conclusion of law, which request and the answer thereto were as follows:

" '5. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Pennsylvania Railroad and judgment is therefore entered in favor of said defendant and against the said plaintiff.'

"Answer. 'Refused' " (page 128a).

December 12th, 1923, Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

24. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 24 filed in that Court, which was:

24. The learned Court below erred in dismissing defendant's twenty-fourth Exception, said Exception and the Order dismissing the same being as follows:

"24. The learned trial Judge erred in finding as a fact the following:

" '1. That the defendants on March 1, 1920 confiscated 80 cars of coal, aggregating 4,577.55 net tons, the property of the plaintiff" (page 129a).

December 12th, 1923, Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

25. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 25 filed in that Court, which was:

25. The learned Court below erred in dismissing defendant's twenty-fifth Exception, said Exception and the Order dismissing the same being as follows:—

"25. The learned trial Judge erred in finding as a fact the following:

" '2. The cost of said coal to the plaintiff at Philadelphia was $22,875.22 and the market value at the time it was converted by the defendant, to wit, March 1, 1920 was (delivered at Philadelphia) $6.44 a net ton or $29,479.42' " (page 129a).

December 12th, 1923, Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

26. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 26 filed in that Court, which was:

26. The learned Court below erred in dismissing defendant's twenty-sixth Exception, said Exception and the Order dismissing the same being as follows:

"26. The learned trial Judge erred in finding as an additional conclusion of law the following:

" '1. That on the facts found the defendant is liable to pay to the plaintiff the market value of the coal converted, i. e., $29,479.42 less the amount already paid, i. e., $22,875.22, with interest on the balance from March 1, 1920' " (page 129a).

December 12th, 1923, Defendant's Exceptions dismissed (page 2a). (See Order, page 130a.)

27. The Supreme Court of Pennsylvania erred in dismissing Assignment of Error No. 27 filed in that Court, which was:

27. The learned Court below erred in entering judgment in favor of plaintiff and against defendant, as follows:—

"Dec. 18, 1923, Judgment on findings in favor of plaintiff.
"Eo die, Damages assessed at $8,109.95" (page 2a).

28. The Supreme Court of Pennsylvania erred in affirming the judgment of Court of Common Pleas No. 4, of Philadelphia County, in favor of George B. Newton Coal Company and against this plaintiff-in-error in the sum of $8,109.95.

By reason whereof this petitioner and plaintiff-in-error prays that the judgment of the Supreme Court of Pennsylvania may be reversed.
John Hampton Barnes, Counsel for Plaintiff-in-Error.

[File endorsement omitted.]

IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE

I, Thomas Robins Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do herby certify that the foregoing is a true and correct copy of the whole and entire Printed Record and other papers before the Supreme Court, as per Stipulation of counsel, in the cases of George B. Newton Coal Company vs. James C. Davis, Director General &c. Nos. 33 & 34 January Term, 1925, as full, entire and complete as the same remains on file in the said Supreme Court, in the cases there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof, as stipulated by counsel.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Philadelphia, in the said Eastern District of Pennsylvania, this 21st day of October in the year of our Lord One Thousand Nine Hundred and Twenty-four.

Thomas Robins, Prothonotary. E. W. M. (Seal of the Supreme Court of Pennsylvania Eastern District. 1776.)

IN SUPREME COURT OF PENNSYLVANIA

JUDGE'S CERTIFICATE TO CLERK

I, Robert von Moschzisker Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Thomas Robins was, at the time of signing the annexed attestation, and now is, Prothontary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto sul scribed my name this 21st day of October, one thousand nine hundred and twenty-four.

Robert von Moschzisker, Chief Justice.

IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE TO JUDGE

I, Thomas Robins, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable Robert von Moschzisker by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 21st day of October, one thousand nine hundred and twenty-four.

Thomas Robins, Prothonotary. (Seal of the Supreme Court of Pennsylvania, Eastern District. 1776.)

Endorsed on cover: File Nos. 30,674, 30,675. Pennsylvania Supreme Court. Term No. 709. James C. Davis, Director General of Railroads, as agent of the President, operating Philadelphia & Reading Railway, plaintiff in error, vs. George B. Newton Coal Company. Term No. 710. James C. Davis, Director General of Railroads, agent operating the Pennsylvania Railroad, plaintiff in error, vs. George B. Newton Coal Company. Filed October 29th, 1924. File Nos. 30,674, 30,675.

JAN 7 1925
WM. R. STANSBURY
CLERK

Nos. 709 & 710. OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

JAMES C. DAVIS, Director General of Railroads, operating the Philadelphia & Reading Railway,
Plaintiff-in-Error,

vs.

GEORGE B. NEWTON COAL COMPANY,
Defendant-in-Error.

JAMES C. DAVIS, Director General of Railroads, operating the Pennsylvania Railroad,
Plaintiff-in-Error,

vs.

GEORGE B. NEWTON COAL COMPANY,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFFS-IN-ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1924. NOS. 709-710.

James C. Davis, Director General of Railroads, operating the Philadelphia & Reading Railway, Plaintiff-in-Error,

vs.

George B. Newton Coal Company, Defendant-in-Error.

James C. Davis, Director General of Railroads, operating the Pennsylvania Railroad, Plaintiff-in-Error,

vs.

George B. Newton Coal Company, Defendant-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR.

STATEMENT OF THE CASE.

The defendant-in-error, George B. Newton Coal Company, is a retail coal dealer in the City of Philadelphia, which in the year 1919 had certain contracts with bituminous coal operators for the delivery, f. o. b. mines, of certain quantity and quality of bituminous coal. These contracts contained provisions that they were subject to the rules or regulations of the United States Fuel Administration.

During January and February of 1920 certain coal consigned to the Coal Company under these contracts was diverted while in transit pursuant to the orders of the President of the United States and the United States Fuel Administrator issued under the authority of the Act of Congress approved August 10, 1917, known as the Lever Act.

The agency of the Fuel Administrator to divert the coal was the Director General of Railroads and delivery by order of the Fuel Administrator was made to the plaintiffs-in-error under priority orders of the Fuel Administrator for use as fuel upon the railroads operated by the plaintiffs-in-error.

In accordance with the regulations of the Fuel Administrator payment was made for the consignee to the shipper at the price fixed by the contracts between them. The Coal Company, upon receiving notice of the diversions, purchased coal in the market at prices higher than the rate fixed by the Fuel Administrator, and brought suit to recover the difference between these prices and the amount represented by the contract price of the coal.

The Food and Fuel Control Act of August 10, 1917, known as the Lever Act, by Section 25, conferred upon the President of the United States certain powers to be exercised by him for the "efficient prosecution of the war." Among the powers granted was that of regulating the price and distribution of fuel. Under this authority the President, in 1917, appointed a Fuel Administrator with power specified in the orders, which are part of this record, who exercised the authority imposed upon him during the active conduct of the war, but shortly after the armistice and before the formal execution of the treaty of peace between the United States and Germany, the President by executive order suspended substantially all orders relating to the control of fuel and the Fuel Administrator ceased to function.

It was provided, however, in the order of January 31, 1919, as follows (Record, page 85a):—

> "SECTION IV. That nothing in this order contained shall be construed to cancel or revoke the designation or appointment of any person as an officer, agent,

representative, counsel, assistant, or subordinate of said United States Fuel Administrator or of the United States Fuel Administration."

On October 30, 1919, the President, by executive order (Record, pages 86a, 87a), annulled the orders suspending the activities of the Fuel Administrator and restored rules, regulations, orders and proclamations concerning the fixing of prices for coal, vesting in the Fuel Administrator the power, as occasion might arise, to restore, change or make such rules and regulations relating to the production, sale, shipment and apportionment of bituminous coal as in his judgment may be necessary.

On October 31, 1919, the Fuel Administrator appointed the Director General of Railroads to make such diversion of coal which the railroads under his direction might as common carriers have in their possession as might be "*necessary in the present emergency to provide for the requirements of the country*" in the order of priority set out in the preference list therein referred to. The first upon the preference list was "(*a*) Railroads."

On March 19, 1920, the President issued an executive order again suspending all of the existing regulations in relation to fuel.

The diversions complained of took place between these dates.

The State Supreme Court, affirming the judgment of the Court below (281 Pa. 74), held the orders of the President and the Fuel Administrator to have been unauthorized by the Lever Act because these Courts found as a fact that the war with Germany had ceased prior to October 19, 1919, and that the purpose of the orders was not the efficient prosecution of the war but to meet an emergency incident to a strike in the bituminous coal fields. It was held, further, that the diversion of the coal by the agency of the Fuel Administrator created a liability upon the plaintiffs-in-error to make just compensation to the coal company for its damage resulting from an unlawful taking

of the coal by an order of the Fuel Administrator and an unlawful use of it by the plaintiffs-in-error.

The State Supreme Court further held that the Director General was not in the position of an innocent third person receiving property delivered by a sovereign power for use in the public welfare, but was an agency of the United States which deprived the Coal Company of its property for use by the United States, and because the Director General was also the agency designated in the Transportation Act to answer for civil liabilities, arising out of the operation of the railroads under government control, the liability for damages claimed by the defendant-in-error attached to that office, and the defendant-in-error was not limited to a suit in the Court of Claims or a District Court of the United States against the United States *co nomine*.

The judgments entered by the trial Judge who tried the cases, by consent without a jury, for the amounts claimed by the Coal Company against the Director General were affirmed by the State Supreme Court. These writs of error issued to the State Supreme Court to review the judgments thus obtained.

SPECIFICATIONS OF ERROR.

1. This is directed to the error in affirming plaintiff's thirteenth request for finding of fact as follows:—

> "The orders of October 30, and October 31, were issued to meet the emergency caused by the nation wide coal strike called to begin November 1, 1919."

(This Assignment (Record, page 113a) is identical with the first Assignment in Case No. 710 (Record, page 121a).)

11. This is directed to the error in affirming plaintiff's tenth request for conclusion of law as follows:—

> "The Lever Law and the regulations of the President, the Fuel Administrator and the Director General of Railroads purporting to be issued under the Lever Law, afford no defense to this suit."

(This Assignment (Record, page 116a) is identical with Assignment No. 11 in Case No. 710 (Record, page 124a).) (Assignments 7, 8, 9 and 10, in both cases cover substantially the same question.)

12. This is directed to the error in affirming plaintiff's twelfth request for conclusion of law as follows:—

> "The plaintiff is entitled to judgment against the defendant, James C. Davis, Director General of Railroads, as Agent of the President operating the Philadelphia & Reading Railway in the sum of $2,757.73 with interest from March 1, 1920, to the date of judgment at 6 per cent. per annum."

(This Assignment (Record, page 116a) is identical with Assignment No. 12 in Case No. 710 (Record, page 124a).)

16. This is directed to the error in refusing to affirm without qualification defendant's fifth request for finding of fact, which request and the answer thereto were as follows:—

> "5. Plaintiff's contract for the purchase of coal from Consolidation Coal Company contained the following provision:
>
> " 'This contract is subject to all the rules and requirements, and conditions imposed by the United States Fuel Administrator in the original order effective 7 A. M. December 29th, 1917, and to any modification of such original order that may be made in the order by the United States Fuel Administrator and all of the regulations, requirements and conditions of such order or orders are hereby incorporated herein with the same force and effect as if set forth at length.' "

(This Assignment (Record, page 118a) is identical with Assignment No. 16 in Case No. 710 (Record, page 126a).)

(Assignments 13, 14, 15 and 17, in both cases cover the same question in relation to other contracts.)

18. This is directed to the error in refusing to affirm defendant's seventh request for finding of fact, which request and the answer thereto were as follows:—

> "7. At the time the coal involved in this suit was diverted plaintiff was familiar with the regulations of the United States Fuel Administration, and with the operation under them, during the period in controversy, namely, the first three months in 1920."

(This Assignment (Record, page 119a) is identical with Assignment No. 18 in Case No. 710 (Record, page 127a).)

19. This is directed to the error in refusing to affirm defendant's eighth request for finding of fact, which request and the answer thereto were as follows:—

> "8. During the period from November 1st, 1919, to March, 1920, plaintiff requested the diversion of coal to it in accordance with the regulations of the United States Fuel Administration and coal was so diverted and settlement therefor was made by plaintiff with the shippers of such coal at the prices established by the United States Fuel Administration."

(This Assignment (Record, page 119a), is identical with Assignment No. 19 in Case No. 710 (Record, page 127a).)

20. This is directed to the error in refusing to affirm defendant's first request for conclusion of law, which request and the answer thereto were as follows:—

> "1. The regulations of the United States Fuel Administration fixing the prices to be paid for coal diverted pursuant to its orders were valid and enforcible during the period covered by this suit."

(This Assignment (Record, page 119a), is identical with Assignment No. 20 in Case No. 710 (Record, page 127a).)

21. This is directed to the error in refusing to affirm defendant's third request for conclusion of law, which request and the answer thereto were as follows:—

> "3. As plaintiff knew of the regulations of the United States Fuel Administration with reference to the diversion of coal and benefited by such regulations during the period from November 1st, 1919, to March 1st, 1920, making requests for diversion of coal to it and settling therefor at the prices fixed by said regulations, it is estopped from claiming to recover more than the price fixed by such regulations for coal consigned to it which was diverted to other parties."

(This Assignment (Record, page 120a), is identical with Assignment No. 21 in Case No. 710 (Record, page 128a).)

CASE NO. 709.

23. This is directed to the error in refusing to affirm defendant's sixth request for conclusion of law, which request and the answer thereto were as follows:—

> "6. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Philadelphia & Reading Railway and judgment is therefore entered in favor of said defendant and against the said plaintiff." (Record, page 120a.)

(This Assignment covers the questions raised in Assignment No. 22 (Record, pages 120a, 128a) in both cases, which is relied upon in the event that the Court shall find that the act of diversion was a confiscation by the United States under Section 10 of the Lever Act.)

CASE NO. 709.

24. The learned Court below erred in entering judgment in favor of plaintiff and against defendant, as follows:—

> "Dec. 18, 1923. Judgment on findings in favor of plaintiff.
>
> "*Eo die,* Damages assessed at $3,386.49." (Page 1a.)

CASE NO. 710.

23. This is directed to the error in refusing to affirm defendant's fifth request for conclusion of law, which request and the answer thereto were as follows:—

> "5. Plaintiff is not entitled to recover anything from the defendant, James C. Davis, Director General of Railroads, as Agent of the President and operating the Pennsylvania Railroad and judgment is therefore entered in favor of said defendant and against said plaintiff." (Record, page 128a.)

(This Assignment covers the questions raised in Assignment No. 22 (Record, pages 120a, 128a) in both cases, which is relied upon in the event that the Court shall find that the act of diversion was a confiscation by the United States under Section 10 of the Lever Act.)

CASE NO. 710.

27. The learned Court below erred in entering judgment in favor of plaintiff and against defendant, as follows:—

> "Dec. 18, 1923, Judgment on findings in favor of plaintiff.
>
> "*Eo die,* Damages assessed at $8,109.95." (Page 2a.)

ARGUMENT.

These cases were tried together in the Court below and heard together on appeal in the State Supreme Court, and will be argued before this Court together in view of the fact that the questions raised are identical in each case.

The Director General, defendant below and plaintiff-in-error, in these cases in this Court, presents for the consideration of this Court questions which go to a determination of the power of Congress to fix the time when war which was instituted by act of Congress shall cease, and whether the state courts shall have concurrent powers to pronounce that the termination of a great war was at a particular moment of time.

These cases also raise for consideration the power of Congress to fix by appropriate agencies the prices at which fuel may be sold during war times and control the distribution of fuel to essential industries.

The validity of the methods adopted by Congress to provide for compensation to those showing loss as a result of the exercise of these powers and the forum in which the claims may be asserted were also considered by the state court, and its conclusions upon these questions are also for review.

The position which the Director General takes upon this argument may be stated substantially as follows:—

1. The executive orders of the President and the Fuel Administrator and the regulations pursuant thereto were lawful, having their foundation in the power granted by the Lever Act which was exercised while the war emergency continued.

2. The diversion of the coal belonging to the Coal Company by the agency of the Fuel Administration to the Director General as the divertee imposed upon him the liability as divertee to pay the price fixed by the orders, and having done so he was relieved from further liability as the divertee by the orders.

3. The act of the Director General in diverting the coal as an agent of the Fuel Administrator imposed no liability upon him as the Federal agent named in the Transportation Act.

In this case if the act of diversion by the Fuel Administration for the use of the Railroad Administration as a branch of the Government amounted to a requisitioning under the Lever Act, it would seem that the proper procedure would be against the United States *co nomine* as therein provided in Section 10, and not by a suit in the District Court of the United States, or State Court, against the Federal Agent named in the Transportation Act as the proper defendant for suits arising out of the operation of the railroads while under Federal control.

In these cases the plaintiff-in-error admitted that James C. Davis is properly named as Director General, who as Federal Agent, is liable for suits against the carriers operated under Federal control for which the carriers would have been liable had they been operated by their own corporate organization.

The position asserted for the plaintiff-in-error in the pleadings, however, does not impose a liability upon the Director General as such for a cause of action resulting from an exercise of power by another Federal agency not authorized by the Transportation Act.

It is upon the confident assumption that the orders and regulations of the President, and the Fuel Administrator, were lawful exercise of power, that the Director General in each of these cases has defended against claims to which the Coal Company can maintain its right only by replacing a power of Congress with a power asserted by the State Supreme Court.

Was the Court below correct in deciding that the orders of the Fuel Administration fixing prices for coal were invalid because issued after the war emergency had terminated?

The Act of August 10th, 1917, 40 Stat. L. 276, entitled "An Act to provide further for the National security and

defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel" commonly known as the Lever Act, provides in Section 25 as follows:—

> "SEC. 25. That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign * * *."

On October 30th, 1919, the President of the United States issued an order restoring certain rules and regulations concerning the prices of coal, which order recited in its preamble that it was issued under the authority of the Act of Congress above referred to and also on account of the necessity "to restore and maintain during the war certain of said rules, regulations, orders and proclamations" (pages 86a and 87a). On the following day, October 31st, 1919, the Fuel Administrator issued an order designating "the Director General of Railroads and his representatives to carry into effect the said order of January 14th, 1918, and to make such diversions of coal which the railroads under his direction may as common carriers have in their possession, as may be necessary in the present emergency to provide for the requirements of the country in the order of priority set out in the preference list included in the order of the United States Fuel Administrator of May 25th, 1918" (page 88a).

The State Court held this latter order to be invalid, its reasons for doing so being shown in its opinion—(Record, pages 152-158).

At the time the transactions involved occurred, January and February, 1920, the war with Germany had not termi-

nated and therefore any powers which the Government had incident to the war still remained. This was decided by this Court in the case of **Hamilton vs. Kentucky Distilleries Co.,** 251 U. S. 146, holding that the exercise of the power to prohibit the liquor traffic by the Government even after the Armistice was within the war powers of Congress. Section 25 of the Lever Act (Act of August 10th, 1917, 40 Stat. L. 276), provides that the President is authorized and empowered "whenever and wherever in his judgment necessary for the efficient prosecution of the war to fix the price of coal and coke," etc.

It must be assumed that all of the orders made by the President or his Agents under this Act were made "for the efficient prosecution of the war" unless the contrary appears on the face of such orders. Not only does the contrary not appear on the face of the orders involved but such orders definitely show that they were made on account of the war emergency. All of the orders, both executive and those made by the Fuel Administration, refer to the Act of Congress of August 10th, 1917. The executive order of October 30th, 1919, states in its preamble * * * "whereas it is necessary to restore and maintain during the war certain of said rules, regulations, orders and proclamations * * *" (page 86a).

The Fuel Administration order of October 31st, 1919, states that it is made on account of the "present emergency" and it must be assumed that this means the war emergency. It certainly was not necessary to use the very words of the Act "* * * for the efficient prosecution of the war" in all of the orders in order to make them valid. In the case of **Hamilton vs. Distilleries Co.,** *supra,* it was sought to show that the war emergency had passed by statements and acts of the President and other executive officers of the Government. This evidence was commented on by Mr. Justice Brandeis at page 159 and the following pages and it should be noted that one of the reasons given for holding that the war emergency still existed was the fact that under the provisions of the Lever Act the President re-

sumed, on October 30th, 1919, the control of the fuel supply which he had relinquished partly on January 31st, 1919, and partly on February 20th, 1919 (page 160). This executive order of October 30th, 1919, is one of the orders involved in the cases at bar, which the State Court has found was invalid because it has found as a fact to its own satisfaction that no war emergency existed at the time of its issuance. This Court held that it must be assumed that the legislation involved was passed on account of the war emergency and refused to enquire into the motive therefor, stating on page 161:—

> "No principle of our constitutional law is more firmly established than that this Court may not, in passing upon the validity of a statute, enquire into the motives of Congress."

The same reasoning would apply to the orders made pursuant to the act of Congress involved in this case and it is submitted that it would be a most unwise policy to allow courts to enquire into the motives of the executive branch of the Government in making orders during the war emergency in order to determine their validity.

The State Court in its opinion, however, said that the testimony showed that the Fuel Administrator in issuing the orders under consideration did not act on account of the war emergency but on account of the threatened coal strike and, therefore, the orders were invalid. Section 2 of the Lever Act provides "that in carrying out the purposes of this Act the President is authorized to create or use any agency or agencies." Congress delegated certain of its powers by this Act to the President and the Fuel Administrator was the President's duly authorized agent in issuing orders, so that these orders were substantially the acts of Congress and, therefore, the first answer to the reasoning of the Court below is that the Court has enquired into the motive of Congress in determining the validity of the orders, which violates the rule quoted above. The second answer to the reasoning of the Court below

is that there is no evidence to justify the finding that the orders were issued solely because of the coal strike, but on the contrary the evidence shows that the conditions existing because of the war emergency were made more alarming by the additional shortage due to the strike.

Section 24 of the Lever Act provides as follows:—

> "SEC. 24. That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President; but the termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated."

The State Supreme Court has held (Record, page 155):

> "Under Section 25 of the Act, the restoration order of October 30th could be issued only if a state of war continued, and the order was promulgated as a war measure. It must be conceded that more than a year before it was issued Germany was hopelessly defeated, her armies disbanded, her fleet surrendered or destroyed, and much of her physical properties, including vast quantities of war material, turned over to the victorious countries. Shortly after the armistice, our own army was disbanded, and when the restoration order was issued our economic life was on a peace basis, with the usual troubles incident thereto. Mean-

while, the President in person had signed a treaty of peace with Germany at Versailles. He had, in vetoing the Volstead Act, publicly asserted, 'Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal': 58 Congressional Record, 7607, October 27, 1919.

"After February, 1919, as stated above, the fuel administrator voluntarily relinquished his office, and between that date and October 30th no phase of the war, qua war, existed. It is not pretended that the basis of the President's order of the latter date was a finding or judgment that it was necessary for the efficient prosecution of the war, nor is any effort made in this record to show such was the case, or that it was directly or indirectly a natural or normal consequence of the war. History shows it was not, and the records are all to the contrary.

"In the report of February 23d, 1920, to the President of the Senate, the director general states that the executive order of October 30th was issued 'in anticipation of a strike of bituminous coal miners, expected to commence November 1st, 1919,' and, because the production of coal fell off, diversions of coal were necessary.

"On this statement of the case it must be apparent that the underlying purposes for which the Act was passed were successfully accomplished, and long since a matter of history; it is just as apparent no legal order such as the ones in question could be founded on that Act. The restoration of the order was not in any way connected with the war, and, as it affected but a part of that community, it falls into that class of private life which the government has not as yet attempted to regulate.

"Even if the Versailles treaty had not been approved by the Senate, or one had been lawfully executed by the two governments, what has been said

> above is ample to show the restoration order of October 30th was not a war measure under the Act, and consequently must be held to be invalid. The purpose for which the Act was passed no longer existed, and an order based on the 'present emergency,' the anticipation of a coal strike, could hardly be considered as being related to the 'efficient prosecution of the war.' Nor would any official statement make it so, if one had been made."

This conclusion of the State Supreme Court is in direct conflict with the decisions of this Court, one of the latest pronouncements of which is by Mr. Justice McKenna in **Commercial Trust Co. vs. Miller,** 262 U. S. 51, where he said:—

> "* * * the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution. * * *"

The fact and date of the termination of the war had not been ascertained and proclaimed by the President in the manner fixed by Congress at the time the events under consideration took place, and this fact of termination was not ascertained and proclaimed until after the orders which are attacked in these cases were suspended. The full force of the statute therefore continued, carrying with it the power to make the orders under consideration, the validity of which was not subject to denial by the State Supreme Court's findings that war had terminated.

Did the Orders under consideration violate the Fifth Amendment by the method provided to fix Compensation?

The war emergency appearing to have been in existence at the time of the making of the orders and the diversion of the coal, we now come to the question of the constitutionality of the orders, with which plaintiffs-in-error have complied by paying to the shipper of the coal the full contract prices thereof.

The State Supreme Court held (Record, page 157):—

> "If we should be in error in holding the regulations were without authority in law, and the defendant must pay the market value in accordance with the legal principal involved, defendant's situation is not improved, as, by the Fifth Amendment to the Federal Constitution, just compensation must be made to the plaintiff in the same measure of damages."
>
> * * * * * * *
>
> "The owner of property taken under the Lever Act is 'entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken: Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S. 299, and cases cited. The ascertainment of compensation is a judicial function': U. S. *vs.* New River Collieries, *supra*, 343, 344.
>
> "To declare what the compensation for plaintiff's coal should be, and to prescribe rules for taking it, regardless of the owner's loss, would be to take this property out of the protection of the Fifth Amendment. 'The government, as a war measure under the exercise of governmental powers, may fix prices, either directly or by governmental regulations necessarily reducing the prices; but this does not authorize it to acquire the property in invitum at such reduced prices': National City Bank *vs.* U. S., *supra*. The plaintiff was

> entitled to judicial ascertainment of his damages. This he secured through the action of the court below."

The question must be approached in the light of the facts, and the answer must take into consideration the identity of the divertee. The diversion was by the agency of the Fuel Administrator and the use of the diverted coal was by the Director General of Railroads, which were the first preferred consumers on the fuel administration list. If the railroads had been privately operated at the time of diversion this case would present substantially the facts found in **Morrisdale Coal Co. vs. United States,** 259 U. S. 188, and the conclusions should be the same as there. If the fact of Government operation requires the diversion to be treated as a requisitioning under section 10 of the Lever Act for use by the United States of America, then a totally different case is developed. In the latter event the sole cause of action would seem to be under that section of the Lever Act, and the rule of **United States vs. New River Collieries Co.,** 262 U. S. 341, would probably apply.

In several decisions of the lower Federal Courts the constitutionality of the Lever Act has been assumed, and there seems to have been but one Federal decision which has discussed and adjudicated the constitutionality of the applicable Sections of the Lever Act,—**Ford vs. U. S.,** 281 Fed. 298. That case was a criminal prosecution against a coal jobber for charging more than fifteen cents per ton profit on coal handled by it contrary to the regulations of the Fuel Administration established pursuant to Section 25 of the Lever Act. The Circuit Court of Appeals for the Sixth Circuit upheld its constitutionality saying, page 303:

> "The constitutionality of section 25 of the act is vigorously assailed on several grounds; the first being that it deprives plaintiffs in error of their property without due process of law. The specific criticisms are that the law is not clear and definite, and that no notice and hearing upon the making of executive

orders is provided for. The first criticism is plainly without merit. Nothing could well be more clear and definite than the plain inhibition against making the selling price more than 15 cents per ton higher than the purchase price. The case is obviously not within the reasoning of the Cohen Case, 255 U. S. 81, 89, 41 Sup. Ct. 298, 65 L. Ed., 516, 14 A. L. R. 1045, which held section 4 of the act (section 3115 1/8ff) invalid; and the instant case is not affected by that decision.

"As to the second criticism: While under ordinary conditions notice and hearing would be conditions precedent to the making of an order of this kind, we agree with the court below (265 Fed. 424) that due process of law is not to be tested by form of procedure merely, that public danger warrants the substitution of executive processes for judicial process (Moyer *vs.* Peabody, 212 U. S. 78, 84, 29 Sup. Ct. 235, 53 L. Ed. 410), and that under the war conditions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but is within the power given to Congress by article 1, §8, of the Constitution, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated."

This Court on February 25th, 1924, reversed this decision—264 U. S. 239—but did so solely on the ground that the Lever Act did not apply to the coal involved, since it was purchased prior to the passage of the Lever Act, and the Court concluded its opinion by stating "we consciously refrain from indicating any opinion respecting the validity of the order as interpreted." The expression of opinion as to the validity of Section 25 of the Lever Act and the price fixing orders issued thereunder, of the Circuit Court of Appeals for the Sixth Circuit, still stands as authority in favor thereof.

A case in a State Supreme Court in which the constitutionality of Section 25 of the Lever Act was considered is **Lajoie vs. Milliken,** *et al.*, 242 Mass. 508. In that case an action of tort was brought by a coal dealer of Lowell, Mass., against the Federal Fuel Administrator for New England appointed by the United States Fuel Administrator, three persons appointed by him as members of the Lowell Fuel Committee and three local coal dealers doing business in that City. The New England Fuel Administrator and three Fuel Commissioners answered that each was a public officer of the United States and that all his acts were done pursuant to authority vested in him by law as such officer. The Court held that the plaintiff could not recover, filing a very interesting and well considered opinion, in which it discussed the validity of the Lever Act and of the regulations issued thereunder as follows (page 522):—

> "A state of war, however, may affect with a public interest articles, which under normal conditions are free to commerce in its usual channels, and thus render subject to governmental regulation that which otherwise would be unobstructed and unhindered by the law. The war powers of the Federal Government in such circumstances would at least be as extensive as the police power of the several States. Hamilton *vs.* Kentucky Distilleries Co., 251 U. S. 146, 156. Fuel is a vital and indispensable necessity. It has been held that its supply and distribution is a public purpose justifying the imposition of taxation for its support and maintenance even in times of peace. Jones *vs.* Portland, 245 U. S. 217, affirming 113 Maine, 123. See Opinions of the Justices, 155 Mass. 598, 601; 182 Mass. 605; art. 47 of Amendments to the Constitution of Massachusetts. The manufacture and transportation of munitions and other necessities of war may require preferences as to fuel not permissible in times of peace. It is not necessary to consider and pass upon the constitutionality of the several parts and details of the Lever Act. It seems to us not open to serious doubt

that in this climate and in the present state of economic art and invention as to production of heat, light and power, the public regulation of the sale, shipment, distribution and apportionment of coal during war is among the powers conferred upon Congress by the Constitution. It is sufficient to say that in our opinion the main purpose of the Lever Act in these particulars is not open to successful attack. There can be no question that the war created a public exigency as to coal."

Mr. Justice Brandeis in **Hamilton vs. Kentucky Distilleries Co.,** *supra,* said at page 156:—

"The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations * * * but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. * * * If the nature and conditions of a restriction upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

In other words, Congress is given certain powers in war time which even the Fifth Amendment does not limit or restrict. The power to restrict the liquor traffic is one, as stated in the case above referred to, for the reason that this is an appropriate means of increasing war efficiency. Is not this war efficiency just as much affected by the use, distribution and price of coal? Indeed the State Court seems to concede that Congress can, as part of its power "for the

efficient prosecution of the war" regulate the price at which coal may be sold and interfere with and modify contracts for the sale thereof. This is what has been done in the cases at bar.

It may be that the facts in this record point the way to a decision favorable to the contention of the Director General without involving the questions heretofore argued. The contracts between the Coal Company and the shippers (Record, pages 39a, 40a), show that the Coal Company agreed that the coal to be shipped under the contracts would be subject to the regulations of the Fuel Administration, including of course the orders, such as those under consideration, to be thereafter issued.

The testimony of Warner, a witness for the coal company (Record, pages 40a-43a), shows the extent to which the defendant-in-error participated in the plan for distribution promulgated by the Fuel administration, and benefited by the same and the prices fixed thereunder.

In the case of **Vogelstein vs. United States,** 262 U. S. 337, this Court held that one who co-operated with others in putting into effect and maintaining a price established by the Government could not later recover a greater price, and the same reasoning would seem to apply to the claim of the defendant-in-error.

The testimony just referred to is sufficiently in point to warrant its reprint:—

Warner (Record, pages 41a, 42a; 41a-43a):

> "Q. You were familiar with the regulations of the United States Fuel Administration, and with the operation under them, were you not, during the period in controversy, the first three months of 1920?
>
> "A. In a general way; yes.
>
> "Q. You were particularly familiar with the provision of the regulation of January 17th, 1919, in effect as of that day, wherein it was provided, 'That

every such contract shall provide that a car of coal deliverable thereunder shall be subject to requisition by the United States Fuel Administrator or his representatives, including under the term "requisition" the right to divert such coal to any other party than the purchaser named in the contract; that such requisition may be made at any time during the continuance of the contract, and prior to actual receipt and unloading of the coal or coke so requisitioned at the point of ultimate destruction by the person entitled thereto under the terms of the contract; that such requisition shall be made at the going Government price in effect at the date of shipment for the particular shipment of the coal or coke so requisitioned; or, if on the date of such shipment there is no going Government price for the coal or coke so requisitioned, then at the price at which such shipment has been consigned by the shipper thereof and without other or further liability of the Government or the requisitionee to either party to the contract than the payment of the price at the time as hereinbefore in this paragraph provided, and transportation and other like charges paid or agreed to.' You are familiar with that provision?

"A. In a general way. Of course, all those details I do not remember.

* * * * * * *

"Q. Do you mean during the period from November 1st, 1919, when the new Fuel Administration regulation went into effect, down to March 1st, 1920, that there were no such diversions made for your benefit?

"A. I could not answer that question, because I do not remember.

(Objected to. Objection overruled. Exception noted for plaintiffs by direction of the Court.)

"Q. Look at that requisition for diversion signed by George B. Newton.

"MR. OLMSTED:—I object. That is November 6th, 1919.

(Objection overruled. Exception noted for plaintiffs by direction of the Court.)

"A. This no doubt came from my office. There were other cases, I assume, of that same kind at that time.

By MR. MASON:

"Q. That continued down, did it not, for a substantial quantity of coal that was diverted from other consignees to your corporation?

"A. I do not know that was diverted from other consignees. As I remember that, the natural procedure was to send to this committee requisitions for coal for certain customers who were on the preferential list. There were certain industries which received preferential treatment.

"Q. Where was the coal to come from?

"A. I do not know. That says Berwind-White, does it not? I think that was more to get shipments made instead of having it diverted. Because, they were only shipping to certain preferential industries.

"Q. Do you have knowledge of the fact that your company did get coal that was diverted from other consignees during the period when the regulations were in effect, and did make settlement with the shipper for such coal?

(Objected to. Objection overruled. Exception noted for plaintiffs by direction of the Court.)

"A. I have no knowledge offhand of that. I would not say that there has not been, because I would have to look that up to see.

"Q. Were you not treasurer of the company during this period?

"A. Yes, sir.

"Q. During that time did you not make payments to shippers other than the shippers you have referred to here?

"A. Yes, sir.

"Q. Were not a number of these payments made

for coal that was not originally shipped to your company, but was diverted to you from some other consignees?

"A. I couldn't tell you that, because we very likely would not know it if it was done through this committee. We would receive the coal and the bill would come from the shipper, but we would not know whether that had been transferred en route or had been shipped direct to us.

"Q. Where, however, it was with a shipper with whom you had not placed an original order yourself, it might have been coal diverted from others, might it not?

"A. It might have been; yes, sir.

"Q. In those cases your settlements were made with the shippers on the basis of the Government price, were they not?

"A. I could not answer that question. I do not know.

"Q. That was the universal way of making such settlements, was it not?

"A. That was the usual way; yes."

In the case of **Morrisdale Coal Co. vs. United States** (*supra*), Mr. Justice Holmes, speaking for the Court, said:—

"The claimant in consequence of the regulation mentioned sold some of its coal to other parties at a less price than what otherwise it would have got. That is all. It now seeks to hold the Government answerable for making a rule that it saw fit to obey. Whether the rule was valid or void no such consequence follows: Making the rule was not a taking and no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands. If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker."

The only difference between that case and the cases at bar is that in the **Morrisdale** case the shipper complied with the regulations and sold the mine output at the prices fixed by the Fuel Administrator. In the cases at bar the Coal Company, as purchaser and consignee, contracted with the shipper to abide by the regulations of the Fuel Administration which, in substance, provided for a re-sale to the divertee at the contract price to be paid by the consignee. The consignee in its turn received the coal of others and made compensation upon the same basis of contract price. If the defendant-in-error believed the regulations of the Fuel Administration to be unlawful because they required it to give up property to a third person, without adequate compensation, the remedy was to refuse to contract with the shippers in the form which read into the contracts the alleged unlawful regulations. It would seem in the light of these facts that the defendant-in-error would not have been in position to make claim against a divertee had such divertee been other than a Federal agency, and there seems to be no reason in law why a different liability should be imposed upon either the Director General of Railroads or the United States of America. This Court decided in the **Morrisdale** case that there was no such liability upon the United States of America, and it would seem to follow that it should now decide that there is no such liability upon the Director General of Railroads.

The State Supreme Court disposed of the contention of the plaintiff-in-error that there was a different status for the Director General as Agent of the Fuel Administrator and the Director General as Federal Agent designated by the President under Section 206 (*a*) of the Transportation Act, as follows (Record, pages 157, 158):—

> "The compensation was fixed at the amount of the judgment, and unless the action should have been against the United States, the judgment should be affirmed.
>
> "The Court below, on this latter question, states: 'The defendant however insists that the suit should

then have been brought against the United States, *co nomine*, and not against the Director General of railroads. And so it should, if Congress had not otherwise directed by (sec. 206 of the) Act of February 28, 1920 (c. 91, 41 St. L. 456, 461), which provides that, Actions at law * * * based on causes of action arising out of the * * * operations by the President of the railroad * * * of any carrier (under the provisions of the Federal Control Act) * * * of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose.'

"The action is based on section 206 of the Transportation Act, and it must be held to be one that arises out of the possession, use or operation by the President of the railroads involved during Federal control.

"While some stress is laid upon the dual capacity of the Director General as head of the Fuel Administration, and at the same time Director General, yet cutting through the screen of titles and authority, the fact is that, under the order of the Director General, coal was seized and used by the defendant. The companies received the benefit of it, and now seek to pay only the price fixed by the government, and refuse compensation to the plaintiff for its undoubted loss sustained by the taking. This they cannot do. Conversion must be followed by just compensation. The party benefited was the defendant in this suit; the Director General is properly named as the defendant. In the suit against him while operating the Philadelphia and Reading Railway Company, he expressly admits he is properly named as defendant, and in the Pennsylvania Railroad Company Appeal he expressly admits he diverted the coal; this necessarily carries with it an implied admission that he is the proper defendant."

The confusion is that which invariably accompanies the efforts of State Courts to legislate in aid of Congressional

enactments. The origin of the Fuel Administrator and the Federal Agent is in the Federal Statutes, and both are agencies of the President. One derived his powers, however, from the Lever Act and the other from the Transportation Act. There is no authority given to the Federal Agent under section 206 of the latter to answer for the acts of the agencies of the Fuel Administration under Section 10 of the Lever Act, or under the general power of condemnation of the Federal Government, but merely for those causes of action for which the carriers would have been otherwise liable.

The Director General as Federal Agent, plaintiff-in-error in these cases, admits his liability under the orders of the Fuel Administrator to pay the proper price for coal lawfully diverted to the Director General and lawfully used by the Director General in the operation of the railroads. He has assumed that the payment of the price fixed by the Fuel Administration discharged this liability, but if authority was lacking to fix such price, then for the coal lawfully diverted he is liable for such price as may be judicially determined.

The Director General as Federal Agent denies liability for any acts of the Fuel Administrator, in the nature of commandeering by the United States, and the attempt of the Coal Company to base liability upon the alleged unlawful act of diversion was met by the defense asserted, as to this contention, in the Court below.

The clear distinction which this Court has drawn between the several capacities in which the Director General funtioned is found in

Dahn *vs.* Davis, 258 U. S. 421;
DuPont *vs.* Davis, 264 U. S. 456;
North Carolina Ry. Co. *vs.* Lee, 260 U. S. 16;
Missouri R. R. *vs.* Ault, 256 U. S. 554.
Davis *vs.* Donovan, 265 U. S. 257;
Davis *vs.* O'Hara, 63 Oct. Term, 1924. Opinion, November 24, 1924.

All of the foregoing seems to justify the conclusions that:

(*a*) The Fuel Administrator lawfully exercised a valid power when he diverted through the agency of the Director General the coal of the defendant-in-error.

(*b*) The Fuel Administrator lawfully exercised a valid power when he fixed the price to compensate the Coal Company for the coal diverted.

(*c*) The plaintiff-in-error, as Federal Agent under the Transportation Act, although the proper defendant to answer the claim of the Coal Company (assuming (*a*) and (*b*) to be conceded) is not liable for further damages because the full liability of the Director General as carrier and divertee was discharged when he made payment to the shipper of the contract price of the coal in accordance with the regulations of the Fuel Administrator.

(*d*) The Coal Company is not free to attack the validity, or to claim damages because of, the orders of the Fuel Administration because it wrote into its contracts with the shippers an agreement to obey the said Orders and Regulations, and its complaint, if any, is solely against its own contracts.

The Director General therefore prays that the judgments of the State Supreme Court be reversed with such instructions as this Court may deem proper in the premises.

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WM. CLARKE MASON,
CHARLES MYERS,
Counsel for Plaintiffs-in-Error.

JAN 5 1925
CLERK

Nos. 709 & 710. OCTOBER TERM, 1924

IN THE

Supreme Court of the United States

JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Philadelphia & Reading Railway, Plaintiff-in-Error,

vs.

GEORGE B. NEWTON COAL COMPANY, Defendant-in-Error.

JAMES C. DAVIS, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad, Plaintiff-in-Error,

vs.

GEORGE B. NEWTON COAL COMPANY, Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR DEFENDANT-IN-ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1924. NOS. 709-710.

James C. Davis, Director General of Railroads, as Agent of the President, operating the Philadelphia & Reading Railway, Plaintiff-in-Error,

vs.

George B. Newton Coal Company, Defendant-in-Error.

James C. Davis, Director General of Railroads, as Agent of the President, operating the Pennsylvania Railroad, Plaintiff-in-Error,

vs.

George B. Newton Coal Company, Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

COUNTER STATEMENT OF THE CASE.

In February, 1920, the plaintiff-in-error seized coal, belonging to the Newton Coal Company, the defendant-in-error, and used it as fuel on federally operated railroads.

The market price of this coal has been judicially determined to be $6.44 per ton. The plaintiff-in-error paid the shippers of the coal the so-called Government price, which was slightly less than $5. The judgments here appealed from are for the difference between the "Government" price and the market value of the coal taken.

The judgment against the Director General operating the Philadelphia & Reading Railway is on account of coal seized while on the rails of that railway, pursuant to orders of the federal officers operating that railway, and burned as fuel in the locomotives of that railway (31a). The same is true, *mutatis mutandis*, of the judgment against the Director General operating the Pennsylvania Railroad. Both suits were brought in accordance with Section 206 (*a*) of the Transportation Act—1920. One of the defenses is that they should have been brought against the United States, *eo nomine*. In the McNeil case (Docket No. 444) which is to be argued just before the argument in this case, the United States contends that suit for the coal there taken should have been brought against the Director General.

The manner of the taking was as follows: Railroad officers issued instructions to their employees to use the coal for fuel purposes and at the same time sent notices to the Newton Company that the coal had been "diverted to this railroad for our supply" (31a). The "Government" price (approximately $5 per ton*) was thereafter paid to the shippers of the coal who had parted with title before the coal was diverted. Inasmuch as they had sold the coal to the Newton Company at the Government price, their demands were satisfied by this arrangement, but the Newton Company, which is a retailer, in order to be able to fulfill its commitments, went on the open market and bought an equivalent quantity of coal at approximately $6.44 per ton.*

The Director General defends on the ground that the diversions were made, and the prices fixed, pursuant to valid

* The prices of the several cars of coal vary. In some cases they are stated in the record in long tons (2240 lbs.) and in some cases in short tons; in some cases prices are quoted at the mines, and in others at Philadelphia. The above figures are an average reduced to the price per ton of 2,000 lbs. at Philadelphia.

orders of the Fuel Administration. The defendant-in-error contends that the orders relied on were void and therefore afford no protection to a taking which was clearly wrongful but for those orders, and, furthermore, that even if the orders were valid regulations of dealings between citizens, they could not, under the Fifth Amendment, legalize a taking of the coal by the Government itself, at less than its market value.

The trial Court and the Supreme Court of Pennsylvania upheld the defendant-in-error in all three of these contentions, viz., they held that the regulations were void, that in no event could they authorize a taking of property by the Government at less than its value, and that suit was properly against the Director General. In view of the federal questions involved, the State Supreme Court allowed a writ of error to this Court.

The Fuel Administration orders relied on by the plaintiff-in-error are found in the Record at pages 68a to 92a and are stated in some detail at the beginning of Mr. Justice Kephart's opinion (pages 152-3). In brief the facts are these:—

The war time regulations of the Fuel Administration were "suspended" in January and February of 1919, and the Fuel Administration itself soon after disintegrated. In October, 1919, a nation wide coal strike was called to be effective November first, and on October 30, 1919, approximately a year after the armistice, and approximately nine months after the suspension of the war time Fuel Regulations, the President, by proclamation, re-instated those regulations. The next day Dr. Garfield, the Fuel Administrator, designated the Director General of Railroads and his representatives to make such diversions of coal as might be necessary "in the present emergency." The diversions in question were made in February, 1920, pursuant to these proclamations.

The regulations thus revived had originally been made during the war, under the authority granted to the President by the Lever Act to make such regulations and to fix prices,

"whenever and wherever in his judgment necessary *for the efficient prosecution of the war.*" The admitted purpose of their revival was to meet the emergency caused by the coal strike (53a). The question which arises, is, therefore, whether the revival of the regulations and seizures made under them are within the statutory authority conferred on the President.

ARGUMENT.

Discussion of the question whether an action may properly be brought against the Director General, against the United States, or against both, is postponed until the nature of the right asserted in that suit has been considered. That right depends on the validity or invalidity of the post-war fuel regulations. The question of their validity divides itself into two, viz., first, whether the diversions are within the statutory authority of the President, and, second, assuming the *diversion* is authorized, whether the *price fixing* is legal, *i. e.*, whether the Government may take this property at a price less than its actual value. One question is whether the Government had a right to take the coal at all; the other queston is, assuming that it had the right to take, how much it shall pay.

THE POST-WAR FUEL REGULATIONS OF 1919-20 WERE NOT WITHIN THE PRESIDENT'S STATUTORY POWER TO REGULATE THE DISTRIBUTION OF COAL "WHENEVER IN HIS JUDGMENT NECESSARY FOR THE EFFICIENT PROSECUTION OF THE WAR."

In an effort to escape the logic of the State Court's opinion, counsel for the plaintiff-in-error opens up a question far wider than any which is involved here. He discusses whether the war power had ceased to exist in October, 1919, when the President revived the regulations and in February, 1920, when the coal was taken, citing Hamilton *vs.* Kentucky Distilleries Co., 251 U. S. 146, and Com-

mercial Trust Co. *vs.* Miller, 262 U. S. 51, to prove that at that time the power had not lapsed. To the cases cited might well be added the District Rent cases, Block *vs.* Hirsh, 256 U. S. 135, and Chastleton Corporation *vs.* Sinclair, 264 U. S. 543, wherein this Court held that housing legislation was justified by emergency conditions in 1919, but not in 1922. "A law depending upon the existence of an emergency or other certain state of facts to uphold it," says Mr. Justice Holmes in the latter case, page 547, "may cease to operate if the emergency ceases or the facts change even though valid when passed." The validity of Congressional regulation of the liquor traffic, of enemy property and of housing facilities in Washington, depends on the nature of the regulations, and the existence and nature of the emergency. It would not follow from any principle announced in any of those cases that Congress could or could not have authorized the diversion of coal from its owner in 1919 or 1920.

But this elaborate discussion of the powers of Congress in the war emergency is quite beside the mark. The question here is not what power Congress *might* have given the President under the war power, but what power it *did* give him in the Lever Act.

For the very broad powers given the President by Section 25 of the Lever Act are carefully restricted as to the time and purpose for which they may be exercised, viz., when necessary "for the efficient prosecution of the war." When, therefore, the Court inquires whether these regulations were re-issued and this coal was taken for the efficient prosecution of the war, it is not questioning the President's motives, as counsel for plaintiff-in-error argues; it is examining a jurisdictional fact. Congress made the exercise of the power subject to a condition; it is for the Court to determine whether that condition exists. If the Court found that the condition did not exist, the act of the President would be beyond his jurisdiction, notwithstanding his own finding that the condition did exist, for, as the State Court said, "the rights of citizens must depend on

things as they are and not on the protestations of administrative officers" (page 155).

In the present case, however, there is no conflict between the finding of the Court and the protestations of administrative officers. Neither the President nor any of his subordinates in the Fuel or Railroad Administrations ever contended that these orders had any raison d'être other than the coal strike. The Director General so stated officially in his report to the Senate on February 23, 1920, and his witness in this case, a member of the Regional Coal Committee, so testified on this record (53a). Neither in his order of October 30, 1919, nor elsewhere did the President state that in his judgment the revival of these regulations was necessary for the efficient prosecution of the war. How could he, in candor, have made such a finding? Four months before he had, in person, signed the Treaty of Versailles, and the very week in which he revived the Fuel Regulations, he advised Congress, in vetoing the Volstead Act, that "the purposes of particular legislation arising out of war emergency have been satisfied" (58 Cong. Rec. 7607, Oct. 27, 1919). Before this coal was seized, the Treaty of Versailles had not only been signed, but it had been ratified by the principal belligerents, ratifications had been exchanged, and the treaty was actually in effect. The seizures were not necessary for the efficient prosecution of the war for the reason that there was no war to prosecute.

A sharp distinction is at once obvious between Section 25 of the Lever Act, which was limited by its terms to the actual conduct of the war, and such statutes as the Prohibition Act, which by terms equally specific, applied to emergencies which were the aftermath of war. The Prohibition Act of November 21, 1918, was to be effective "until the conclusion of the present war *and thereafter until the termination of demobilization.*" Hamilton *vs.* Kentucky Distilleries Co., *supra,* page 153. Demobilization is no less a war emergency because it necessarily comes after the war; the coal strike, on the contrary, occurred not only *after* the war—a full year after the war—but *independent* of the war.

The language of Section 25 of the Lever Act is also to be contrasted with the language of other sections (40 Stat. 276-284). Section 5 empowers the President to license dealers whenever he finds it essential "in order to carry into effect any of the purposes of this Act." His powers under Section 12 are to be exercised whenever he finds it necessary "to secure an adequate supply of necessaries for the support of the army or the maintenance of the navy, or for any other public use connected with the common defense." Under Section 13 he can restrain speculation and other evil practices whenever he "finds it essential in order to prevent" them. He can guarantee the price of wheat, under Section 14, whenever he finds "that an emergency exists requiring stimulation of the production of wheat." And in Section 15 the powers are conferred when "essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved thereby."

It will be noted that the occasions on which the powers conferred by these sections can be exercised are less closely restricted than those conferred by Section 25. All of the other powers could be exercised to meet a post war emergency; in Section 25 alone is the use of the power restricted to the actual prosecution of the war.

It would be useless to reiterate the reasoning of Mr. Justice Kephart's opinion (pages 152-157). It is submitted that the Supreme Court of Pennsylvania was correct in finding that the diversion of this coal to the railroads for fuel consumption in 1920 exceeded the power given to the President by Section 25 of the Lever Act. Its consumption by the railroad was, therefore, an unlawful conversion, and the owner of the coal was entitled to recover its value from the wrongdoer.

THE GOVERNMENT, HAVING TAKEN AND USED THE COAL, MUST PAY ITS FAIR VALUE, JUDICIALLY DETERMINED.

But let us assume that the taking was not wrongful, but of right. Let us assume that the President, acting through

the Fuel Administrator, who had delegated his powers to the Director General of Railroads, had authority to divert the coal from its owner to another. What price must be paid for it?

Plaintiff-in-error seems to assume that if the coal were diverted to a private citizen, the payment of the price fixed by the war time regulations would acquit the divertee of all liability. To this proposition we do not assent. Section 25 of the Lever Act, which gives the President power to fix prices, also provides that in fixing the prices, he shall cause a careful inquiry to be made into costs and other factors affecting the price. There is no pretense that such an inquiry was made here. The price paid by the divertee of this coal was fixed in a series of orders, of which the latest is dated May 24, 1918 (68a-79a). The Government control of prices had been lifted on January 31, 1919, and there followed nine months of free trading. Suddenly, on October 30, 1919, the President revived the 1918 prices. Current prices, as this record shows, and the trial Court found, were far higher than the 1918 prices (104a-105a). Under such circumstances we submit that even though the *diversions* were lawful, the 1918 *prices* were not binding, and therefore, even though the Director General were a private citizen, the payment of the 1918 price would not protect him in a suit by the owner of the coal.

But the Director General was not a private citizen. A suit against him "is an action against the United States." Davis *vs.* O'Hara, Adv. Op. Oct. Term, 1924, pages 119, 120, and cases cited. Corona Coal Co. *vs.* United States, 263 U. S. 527. Plaintiff-in-error stresses the dual capacity of the Director General. As Fuel Administrator he diverted the coal; as Railroad Operator he received it. This is but another way of saying that the Government both took and used the coal. How much must it pay for it?

Even the plaintiff-in-error, in answering that question, concedes that "the rule of United States *vs.* New River Collieries Co., 262 U. S. 341, would probably apply" (Brief, page 18).

That rule is stated by Mr. Justice Butler at pages 343-4 as follows:—

> "Section 10 of the Lever Act in obedience to the Fifth Amendment provides for just compensation. The war or the conditions which followed it did not suspend or affect these provisions. United States *vs.* Cohen Grocery Co., 255 U. S. 81, 88. The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. Seaboard Air Line Ry. Co. *vs.* United States, 261 U. S. 299, and cases cited. *The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard.* Monongahela Navigation Co. *vs.* United States, 148 U. S. 312, 327. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. Vogelstein & Co. *vs.* United States, decided this day, *ante*, 337; United States *vs.* Chandler-Dunbar Water Power Co., 229 U. S. 53, 80, 81; Boom Co. *vs.* Patterson, 98 U. S. 403, 407. More would be unjust to the United States and less would deny the owner what he is entitled to." (Italics ours.)

The sentence italicized precludes, as definitely as any words can, the very device on which the plaintiff-in-error here relies. Instead of *requisitioning* fuel under the machinery provided in Section 10 of the Lever Act, the Director General, using the machinery set up under Section 25, *"diverts"* the coal to himself, and fixes a price, less than the actual value, at which he, the divertee, will settle with the owner. This is one of the simplest methods of evading the Fifth Amendment yet devised. It is a mere matter of adjusting prefixes. If the Government converts coal to its own use it has to pay its value; if it diverts it for its own use it does not.

In National City Bank *vs.* United States, 275 Fed. 855, the Navy requisitioned some coffee under the Lever Act, and attempted to settle for it at the Food Administration price. The Court held that the Navy must pay the actual value. In excluding testimony of the "Government" price, Judge Mayer said (pages 860-861):—

> "Under these decisions it is clear that the provisions of the Lever Act and of the regulations thereunder, attempting to limit the powers of the owner of property, cannot be considered in this proceeding as affecting the value of the property. The government, as a war measure, under the exercise of governmental powers, may fix prices, either directly or by governmental regulations necessarily reducing the prices; *but this does not authorize it to acquire the property in invitum at such reduced prices.* Los Angeles *vs.* Los Angeles Gas Corporations, 251 U. S. 32.
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> "To carry out the purposes of the act, the President could make regulations in the way, *inter alia,* of fixing prices in ordinary trading or commercial transactions; but when the United States itself took foods—*i. e.,* property—it was bound to award just compensation, and what is just compensation under the Constitution is determined by the same legal principles in war as in peace." (Italics ours.)

This decision was affirmed by the Circuit Court of Appeals of the Second Circuit, 281 Fed. 754, and the appeal to this Court was dismissed upon motion of the Solicitor General, 263 U. S. 726.

Vogelstein *vs.* United States, 262 U. S 337, presents no exception to the rule of determining what is just compensation. In that case the Court of Claims found that 23½ cents a pound, the "Government" price, which was the price paid for plaintiff's copper, was the market price. "The finding of the Court of Claims is plain and cannot

be read as referring to a mere fiat price. It is not impaired, but is supported and confirmed by other findings. The appellant is bound by it" (page 340). And again, "The market price was paid. The market value of the copper taken at the time it was taken measures the owner's compensation." (*Ibid.*)

Of course the Government price *may* be the market value and in such case it is just compensation. But here it has been judicially determined that the Government price was *not* the market value and therefore it is not just compensation.

In his opinion, Mr. Justice Butler refers to the fact that Vogelstein participated in the conferences between the War Industries Board and the copper producers at which the price of 23½ cents was fixed, and apparently it is to this feature of the Vogelstein case that plaintiff-in-error likens the Newton case. It is not contended, however ,that the officers of the Newton Company took any part in the fixing of the Government prices. It is merely urged that, as to coal which may have been diverted *to* the Newton Company, it may have benefited by the regulations, and therefore it should not be allowed to sue where it has been injured by them. A careful perusal of the testimony cited by plaintiff-in-error (pages 22-25) discloses that it is pure hypothesis of counsel that coal was in fact diverted to the Newton Company (other than replacements of coal taken from the company, or already contracted for by it) and if so, that the divertee profited financially. Even if the Newton Company were liable to someone else for coal so diverted to it, that would not affect its right against the Director General. Nor is it of any avail to the Director General that the Newton Company's contracts with the mine operators protected the seller against suit by the buyer in case the Government diverted the coal. The buyer and seller may contract as they will which of them shall carry the risk of Government interference with their business; surely that does not authorize the Government to acquire their property for less than its value.

THIS SUIT WAS PROPERLY BROUGHT AGAINST THE DIRECTOR GENERAL UNDER SECTION 206a OF THE TRANSPORTATION ACT—1920.

These suits were brought under Section 206a of the Transportation Act—1920, which provides that: "Actions at law * * * based on causes of action arising out of the possession, use, or operation by the President of the railroad * * * of any carrier * * * of such character as prior to Federal control could have been brought against such carrier, may * * * be brought against an agent designated by the President for such purpose * * *" 41 Stat. L. 461. Do these suits come within the language quoted? We submit that they do, whether the taking be decided to be wrongful or of right.

If the orders were invalid, the taking was wrongful and all who participated in the transactions were trespassers in their own wrong. That the Director General is liable for torts committed by railroad employees is well settled. Missouri Pacific R. R. Co. *vs.* Ault, 256 U. S. 554, 563; Director General *vs.* Kastenbaum, 263 U. S. 25. We do not understand that counsel for plaintiff-in-error controverts this proposition.

If the taking be assumed to be lawful, the Director General is none the less liable. In the pleadings he admits he is the proper defendant (page 158) and on brief counsel reiterates that admission. He says (page 28) that "The Director General as Federal Agent, plaintiff-in-error, in these cases, admits his liability * * * to pay the *proper price* for coal *lawfully diverted* to the Director General" and lawfully used by him in the operation of the railroads. He has assumed, he says, that the Fuel Administration price was the proper price, but if he is in error about this "then for the coal lawfully diverted he is liable for such price as may be judicially determined." Inasmuch as the judicially determined price is what is sued for, it would seem that these admissions of counsel should settle the question of whether the Director General is the proper party defendant.

Certainly these suits come exactly within the language of the statute. The cause of action arises out of Federal Control. It is of such character as prior to Federal Control could have been brought against a corporate carrier; for surely an action lies against a corporation to recover the value of property to which it has rightfully obtained title, *e. g.*, by eminent domain, or under contract.

It is, we submit, irrelevant that an action would also lie against the United States *co nomine*, under Section 10 of the Lever Act. The Lever Act is the earlier statute. It provides a remedy for the owner of property requisitioned for any department of the Government. The Transportation Act is a later statute which provides machinery for claims of any sort against a single department of the Government. The Lever Act is a broader statute in that it applies to requisitions by all departments of the Government; the Transportation Act is a broader statute in that it applies not merely to requisitions but to all sorts of claims. In the field of claims on account of property requisitioned for the railroads the two statutes overlap and it would seem that the owner has alternative remedies.

At any rate his remedy under the Transportation Act is clear. For a right explicitly given him by the later statute will not be denied him because, under an earlier statute, he has, or formerly had, another remedy.

Respectfully submitted,

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WILLIAM A. GLASGOW, JR.,
Counsel for Defendant-in-Error.

DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., OPERATING PHILADELPHIA & READING RAILWAY, *v.* NEWTON COAL COMPANY.

DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., OPERATING PENNSYLVANIA RAILROAD, *v.* NEWTON COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 709 and 710. Argued January 12, 1925.—Decided March 2, 1925.

1. While coal which plaintiff had purchased through contracts with producers was in course of transportation over railroads then under Federal Control, it was commandeered by the Director General of

Railroads, acting under orders of the Fuel Administrator, for use in operating the railroads, and he paid the producers the prices fixed by the Fuel Administrator, which were the same as the prices named in plaintiffs' contracts. *Held*

(*a*) That the plaintiff was entitled to be paid the difference between prices thus paid to its vendors and the market value, which was higher. P. 301.

(*b*) That by § 206 (a) of Transportation Act, 1920, actions therefor could be maintained in the state court against the agent designated by the President under that Act. P. 301.

281 Pa. St. 74, affirmed.

ERROR to a judgment of the Supreme Court of Pennsylvania affirming recoveries from the Director General of Railroads, as agent under the Transportation Act, 1920, on account of coal seized and appropriated for operating railroads while under Federal Control.

Mr. Wm. Clarke Mason, with whom *Mr. John Hampton Barnes* and *Mr. Charles Myers* were on the brief, for plaintiff in error.

At the time of the transactions, January and February, 1920, the war with Germany had not terminated and therefore any powers which the Government had incident to the war still remained. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146.

It must be assumed that all of the orders made by the President or his agents under § 25 of the Lever Act were made "for the efficient prosecution of the war" unless the contrary appears on the face of such orders. The orders here definitely show that they were made on account of the war emergency. All of the orders, both executive and those made by the Fuel Administration, refer to the Act of Congress of August 10th, 1917. The executive order of October 30th, 1919, states in its preamble ". . . whereas it is necessary to restore and maintain during the war certain of said rules, regulations, orders and proclamations . . . ."

The Fuel Administration order of October 31st, 1919, states that it is made on account of the "present emergency" and it must be assumed that this means the war emergency.

It would be a most unwise policy to allow courts to enquire into the motives of the executive branch of the Government in making orders during the war emergency in order to determine their validity.

The state court in its opinion, however, said that the testimony showed that the Fuel Administrator in issuing the orders under consideration did not act on account of the war emergency but on account of the threatened coal strike and, therefore, the orders were invalid. Section 2 of the Lever Act provides "that in carrying out the purposes of this Act the President is authorized to create or use any agency or agencies." Congress delegated certain of its powers by this act to the President and the Fuel Administrator was the President's duly authorized agent in issuing orders, so that these orders were substantially the acts of Congress and, therefore, the first answer to the reasoning of the court below is that the court has enquired into the motive of Congress in determining the validity of the orders. The second answer is that there is no evidence to justify the finding that the orders were issued solely because of the coal strike, but on the contrary the evidence shows that the conditions existing because of the war emergency were made more alarming by the additional shortage due to the strike.

The conclusion of the State Supreme Court is in direct conflict with decisions of this Court. *Commercial Trust Co.* v. *Miller*, 262 U. S. 51.

The fact and date of the termination of the war had not been ascertained and proclaimed by the President in the manner fixed by Congress at the time the events under consideration took place, and this fact of termination was not ascertained and proclaimed until after the orders which are attacked in these cases were suspended.

The orders under consideration did not violate the Fifth Amendment by the method provided to fix compensation.

The question must be approached in the light of the facts, and the answer must take into consideration the identity of the divertee. The diversion was by the agency of the Fuel Administrator and the use of the diverted coal was by the Director General of Railroads, which were the first preferred consumers on the fuel administration list. If the railroads had been privately operated at the time of diversion this case would present substantially the facts found in *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, and the conclusions should be the same as there. If the fact of Government operation requires the diversion to be treated as a requisitioning under § 10 of the Lever Act for use by the United States of America, then a totally different case is developed. In the latter event the sole cause of action would seem to be under that section of the Lever Act, and the rule of *United States* v. *New River Collieries Co.*, 262 U. S. 341, would probably apply.

In several decisions of the lower federal courts the constitutionality of the Lever Act has been assumed, and there seems to have been but one federal decision which has discussed and adjudicated the constitutionality of the applicable sections of the Lever Act, *Ford* v. *U. S.* 281 Fed. 298. This Court reversed that decision (264 U. S. 239), but did so solely on the ground that the Lever Act did not apply to the coal involved. See *Lajoie* v. *Milliken, et al.*, 242 Mass. 508.

Congress is given certain powers in war time which even the Fifth Amendment does not limit or restrict. The power to restrict the liquor traffic is one, as stated in *Hamilton* v. *Kentucky Distilleries Co., supra,* at page 156, for the reason that this is an appropriate means of increasing war efficiency. Is not this war efficiency just as much affected by the use, distribution and price of coal?

The contracts between the Coal Company and the shippers, show that the Coal Company agreed that the coal to be shipped under the contracts would be subject to the regulations of the Fuel Administration, including of course the orders, such as those under consideration, to be thereafter issued. In the case of *Vogelstein* v. *United States*, 262 U. S. 337, this Court held that one who cooperated with others in putting into effect and maintaining a price established by the Government could not later recover a greater price, and the same reasoning would seem to apply to the claim of the defendant-in-error. *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188.

The origin of the Fuel Administrator and the Federal Agent is in the federal statutes, and both are agencies of the President. One derived his powers, however, from the Lever Act and the other from the Transportation Act. There is no authority given to the Federal Agent under § 206 of the latter act to answer for the acts of the agencies of the Fuel Administration under § 10 of the Lever Act, or under the general power of condemnation of the Federal Government, but merely for those causes of action for which the carriers would have been otherwise liable.

The Director General as Federal Agent, plaintiff-in-error in these cases, admits his liability under the orders of the Fuel Administrator to pay the proper price for coal lawfully diverted to the Director General and lawfully used by the Director General in the operation of the railroads. He has assumed that the payment of the price fixed by the Fuel Administration discharged this liability; but if authority was lacking to fix such price, then for the coal lawfully diverted he is liable for such price as may be judicially determined.

The clear distinction which this Court has drawn between the several capacities in which the Director General functioned is found in *Dahn* v. *Davis*, 258 U. S. 421;

Dupont v. *Davis*, 264 U. S. 456; *North Carolina Ry. Co.* v. *Lee*, 260 U. S. 16; *Missouri R. R.* v. *Ault*, 256 U. S. 554; *Davis* v. *Donovan*, 265 U. S. 257; *Davis* v. *O'Hara*, 266 U. S. 314.

Mr. Allen S. Olmsted, 2d, with whom *Mr. Wm. A. Glasgow, Jr.*, was on the brief, for defendant in error.

The post-war fuel regulations of 1919–20 were not within the President's statutory power to regulate the distribution of coal "whenever in his judgment necessary for the efficient prosecution of the war."

The Government, having taken and used the coal, must pay its fair value, judicially determined.

Section 25 of the Lever Act, which gives the President power to fix prices, also provides that in fixing the prices, he shall cause a careful inquiry to be made into costs and other factors affecting the price. There is no pretense that such an inquiry was made here. The price paid by the divertee of this coal was fixed in a series of orders, of which the latest is dated May 24, 1918. The Government control of prices had been lifted on January 31, 1919, and there followed nine months of free trading. Suddenly on October 30, 1919, the President revived the 1918 prices. Current prices, as this record shows, and the trial court found, were far higher than the 1918 prices. Under such circumstances we submit that, even though the diversions were lawful, the 1918 prices were not binding, and therefore, even though the Director General were a private citizen, the payment of the 1918 price would not protect him in a suit by the owner of the coal.

But the Director General was not a private citizen. A suit against him "is an action against the United States." *Davis* v. *O'Hara*, 266 U. S. 314, and cases cited. *Corona Coal Co.* v. *United States*, 263 U. S. 527. Plaintiff-in-error stresses the dual capacity of the Director General. As Fuel Administrator he diverted the coal; as Railroad

Operator he received it. This is but another way of saying that the Government both took and used the coal. How much must it pay for it?

Even the plaintiff-in-error, in answering that question, concedes that the rule of *United States* v. *New River Collieries Co.* 262 U. S. 341, would probably apply. *National City Bank* v. *United States*, 275 Fed. 855, s. c. 281 Fed. 754, 263 U. S. 726; *Vogelstein* v. *United States*, 262 U. S. 337.

This suit was properly brought against the Director General under § 206a of the Transportation Act, 1920.

If the orders were invalid, the taking was wrongful and all who participated in the transactions were trespassers in their own wrong. That the Director General is liable for torts committed by railroad employees is well settled. *Missouri Pacific R. Co.* v. *Ault* 256 U. S. 554; *Director General* v. *Kastenbaum*, 263 U. S. 25.

If the taking be assumed to be lawful, the Director General is none the less liable. In the pleadings he admits he is the proper defendant and counsel reiterates that admission.

These suits come exactly within the language of the statute. The cause of action arises out of Federal Control. It is of such character as prior to Federal Control could have been brought against a corporate carrier; for surely an action lies against a corporation to recover the value of property to which it has rightfully obtained title, e. g., by eminent domain, or under contract.

It is, we submit, irrelevant that an action would also lie against the United States *eo nomine*, under § 10 of the Lever Act.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These causes present the same points of law and were heard together both here and below. No disputed question of fact remains. In 1919 defendant in error, a

Pennsylvania corporation, doing business at Philadelphia, contracted with producers for large quantities of bituminous coal, f. o. b. the mines, subject to the regulations of the United States Fuel Administration. During January and February, 1920, while thirty-three cars of coal consigned to the corporation under these contracts were moving over the Philadelphia & Reading Railway, the Director General of Railroads took possession of them and used the fuel for operating trains on that line. Eighty cars loaded with the same character of coal and moving on the Pennsylvania Railroad were similarly treated. The claim is that the Director General took this action under lawful rules and orders of the President, acting through the Fuel Administrator and pursuant to the Lever Act, approved August 10, 1917, c. 53, 40 Stat. 276, 279, 284. The producers of the coal were paid the prices specified in the contracts of purchase, as required by the Fuel Administrator; and it is now maintained that nothing more can be demanded by the owner. The owner's claim is for the difference between the amount received by producers and the market value of the coal—approximately $1.44 per ton.

The Lever Act conferred upon the President certain powers to regulate the prices and distribution of fuel, to be exercised for the efficient prosecution of the war. August 23, 1917, he delegated these powers to a Fuel Administrator, who freely used them during the continuation of hostilities. Shortly after the armistice substantially all such regulations were suspended and the Administrator ceased to function; but his appointment was not canceled or revoked.

On October 30, 1919, the President undertook to restore former orders and to empower the Fuel Administrator, as occasion might arise, to change or make regulations relative to the sale, shipment and apportionment of bituminous coal as the latter might think necessary. The next

day the Administrator delegated to the Director General of Railroads the power to divert coal upon the railroads as might seem "necessary in the present emergency to provide for the requirements of the country." March 19, 1920, the President suspended all fuel regulations.

Seeking to recover the difference between the amounts paid to the shipper—the purchase price—and the market value of the coal, defendant in error commenced these proceedings (June, 1921), in a state court at Philadelphia, against the Agent appointed by the President under the Transportation Act, 1920, c. 91, 41 Stat. 456, 461. Judgments went for it and were affirmed by the Supreme Court. 281 Pa. 74. The latter court held: That the war with Germany had ceased prior to October 30, 1919, and the purpose of the President's order then issued was to meet an emergency incident to the miners' strike—not to provide for the efficient prosecution of the war. Also that seizure and use of the coal by the Director General rendered the United States liable for just compensation, measured by market value. And, further, that the Director General was not an innocent third person to whom property has been delivered by the sovereign for the public welfare, but an agency of the United States for operating the railroads, and, under the Transportation Act, 1920, plaintiff in error might be sued upon claims arising therefrom.

The plaintiff in error now insists: That the order of October 30, 1919, and the regulations issued by the Fuel Administrator and the Director General of Railroads acting thereunder, were authorized by the Lever Act. That by diverting the coal to himself the Director General incurred no obligation except to pay the amounts due the shippers under the sale contracts—the compensation fixed by the orders. That the act of the Director General in diverting the coal to himself and its use on the railroads imposed no liability for which an action can be main-

tained against the Agent provided for by the Transportation Act.

From the facts stated it appears, plainly enough, that one hundred and thirteen cars of coal belonging to defendant in error were seized by the United States while upon the lines of carriers under their control and thereafter appropriated and used in the operation of such roads. The taking was for a public use. The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment. As announced in *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343, 344, "where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation" to which the owner is entitled. Also, "the ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

Transportation Act, 1920, § 206(a)—

"Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

If the Philadelphia & Reading Railway Company or the Pennsylvania Railroad Company, while operating its own line, had seized and used the coal as the United States did while they operated those roads, the jurisdiction of the state court of actions to recover damages or compensation would be clear. And so, under the Transportation Act, that court properly entertained the proceedings now before us.

Affirmed.